Supreme Court of the United States

OCTOBER TERM, 1963

No. 209

JOSEPH LYLE STONER, PETITIONER

vs.

CALIFORNIA

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

INDEX

[fol. A]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

S. C. No. 235898
D. A. No. 289731 9766

ROBBERY (Sec. 211 P.C.)—1 Count

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

v.

JOSEPH LYLE STONER, DEFENDANT

INFORMATION—filed November 25, 1960

The said JOSEPH LYLE STONER is accused by the District Attorney of and for the County of Los Angeles, State of California, by this information, of the crime of ROBBERY, in violation of Section 211, Penal Code, a felony, committed as follows:

That the said JOSEPH LYLE STONER on or about the 25th day of October, 1960, at and in the County of Los Angeles, State of California, did willfully, unlawfully, feloniously and by means of force and fear take from the person, possession and immediate presence of David Greeley the following described personal property, to wit:

Cash and checks in the amount of One Thousand and no/100 Dollars ($1,000.00), lawful money of the United States.

That at the time of the commission of the above offense said defendant was armed with a deadly weapon, to wit, .45 automatic pistol.

[File Endorsement Omitted]

WILLIAM B. McKESSON, District Attorney for the County of Los Angeles, State of California

By /s/ Alfred Bornstein Deputy

[fol. B]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

S. C. No. 235898
D. A. No. 289731 9766

ROBBERY (Sec. 211 P.C.) 1 Count
2 PRIORS

[Title Omitted].

AMENDED INFORMATION—filed November 28, 1960

The said JOSEPH LYLE STONER is accused by the District Attorney of and for the County of Los Angeles, State of California, by this amended information, of the crime of ROBBERY, in violation of Section 211, Penal Code, a felony, committed as follows:

That the said JOSEPH LYLE STONER on or about the 25th day of October, 1960, at and in the County of Los Angeles, State of California, did willfully, unlawfully, feloniously and by means of force and fear take from the person, possession and immediate presence of David Greeley the following described personal property, to wit:

Cash and checks in the amount of One Thousand and no/100 Dollars ($1,000.00), lawful money of the United States.

That at the time of the commission of the above offense said defendant was armed with a deadly weapon, to wit, .45 automatic pistol.

That before the commission of the offense hereinbefore set forth in this amended information, said defendant, JOSEPH LYLE STONER, was in the Superior Court of the State of California, in and for the County of Riverside, convicted of the crime of Murder, a felony, and the judgment of said court against said defendant in said connection was on or about the 10th day of December,

1941, pronounced and rendered and said defendant served a term of imprisonment therefor in the State Prison.
[fol. C] That before the commission of the offense hereinbefore set forth in this amended Information, said defendant, JOSEPH LYLE STONER, was in the Superior Court of the State of California, in and for the County of Los Angeles, convicted of the crime of Robbery and Grand Theft, a felony, and the judgment of said court against said defendant in said connection was on or about the 20th day of December, 1943, pronounced and rendered and said defendant served a term of imprisonment therefor in the State Prison.

[File Endorsement Omitted]

WILLIAM B. McKESSON, District Attorney for the County of Los Angeles, State of California

By /s/ William M. Smith Deputy

[fol. D]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

Department No. NORTHEAST A

* * * *

Present Hon. H. BURTON NOBLE, Judge

235898

[Title Omitted]

MINUTE ENTRY OF ARRAIGNMENT—December 1, 1960

Deputy District Attorney William M. Smith and the Defendant in propria persona, present. Arraigned. Motion under 995 Penal Code continued to December 8, 1960, 2 P M. Remanded.

[File Endorsement Omitted]

[fol. E]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

Department No. NORTHEAST A

Present Hon. H. BURTON NOBLE, Judge

235898

[Title Omitted]

MINUTE ENTRIES OF PLEA, APPOINTMENT OF COUNSEL, ETC., December 8, 1960

Deputy District Attorney William M. Smith and the Defendant in propria persona, present. The Court states he has read the entire transcript of the preliminary hearing. Motion under 995 Penal Code denied. Pleads "Not Guilty". Denies priors. Trial set for January 23, 1961, 9:30 A. M. Remanded. At 4 P M: Public Defender appointed, Deputy Public Defender L. Schoenheit, present. The trial date of January 23, 1961 is vacated. Continued to December 15, 1960, 9:30 A M for further proceedings. Remanded.

[File Endorsement Omitted]

[fol. F]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

Department No. NORTHEAST A

* * * *

Present Hon. H. BURTON NOBLE, Judge

235898

[Title Omitted]

MINUTE ENTRIES OF PLEA AND TRANSFER—December 15, 1960

Deputy District Attorney W. M. Smith and Defendant, present. Defendant pleads "Not Guilty" and denies each prior conviction. Trial is set January 30, 1961 at 9:30 A M. Defendant, personally, waives his right to earlier trial. The Court appoints the Public Defender (not Lothair Schoenheit) to represent defendant. 3:00 P M: Trial date of January 80, 1961 is vacated and case is transferred to Department 100 for seting for trial on December 19, 1960 at 9 A M.

* * * *

[File Endorsement Omitted]

[fol. G]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

Department No. 110

* * * *

Present Hon. JOSEPH L. CALL, Judge

235898

[Title Omitted]

MINUTE ENTRIES RELIEVING PUBLIC DEFENDANT AS COUNSEL AND DECLARATION BY DEFENDANT OF SELF REPRESENTATION—February 9, 1961

Cause called for trial. Deputy District Attorney M. D. Rowen and the Defendant with counsel, Deputy Public Defender Edward B. Olsen, present. Due to congested calendar, cause is transferred to Department 106 forthwith for further proceedings. Later: Cause is transferred back from Department 106. On motion of defendant the Public Defender is relieved as defendant's counsel, and defendant declares that he will represent himself in propria persona in the trial of this case. On the Court's own motion and consent of the defendant, trial is continued to March 10, 1961, 9 A M. Witnesses instructed. Remanded.

* * * *

[File Endorsement Omitted]

[fol. H]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

Department No. 110

* * * * *

Present Hon. JOSEPH L. CALL, Judge

235898

[Title Omitted]

MINUTE ENTRIES OF FURTHER APPOINTMENT OF COUNSEL —March 10, 1961

Cause called for trial. Deputy District Attorney H. G. Taylor and the Defendant in propria persona, present. Defendant states he cannot employ private counsel, and requests that an attorney be appointed to represent him. The Public Defender, Deputy Public Defender Edward B. Olsen being present, refuses appointment by reason of personal conflict between defendant and the Public Defender. The Court appoints Frank Duncan, present in court, as defendant's attorney to represent him in this action. By stipulation, trial is ordered continued to March 27, 1961, 9 A M. Witnesses instructed and Sheriff is ordered to return Defendant Shales, a prisoner in the County Jail, as a material witness in this case. Remanded.

* * * *

[File Endorsement Omitted]

[fol. I]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

Department No. 107

• • • •

Present Hon. CLEMENT D. NYE, Judge

235898

[Title Omitted]

MINUTE ENTRIES OF CASE CALLED FOR TRIAL AND EXCLUSION OF WITNESSES—March 27, 1961

Cause, transferred from Department 110, called for trial. Deputy District Attorney H. George Taylor and the Defendant with counsel, F. Duncan, present. Out of the presence of the jury panel, the defendant admits the priors. By order of the Court the following jurors are sworn to try the cause:

Mrs. Leanore M. Prewitt	Mrs. Grace M. Williams
Mrs. Ruth D. Corlett	Mrs. Marilyn R. Dinneen
Mrs. Marie Lautenschleger	Mrs. Mary Hutchinson
Mrs. Hope H. Jones	Mrs. Virginia Taviner
Miss Gloria S. Lacayo	Mrs. Fay Thompson
Ivan R. Roose	Mrs. Anita V. Hesselgesser

This information is read. An opening statement is made by the People. On motion of the defendant, the witnesses are excluded. David Greeley and Donna Mae Ray are sworn and testify for the People. People's Exhibits 1 (gun), 2 (hat), 3 (glasses) and 4 (coat) are all marked for identification only. Defendant's motion, for a mistrial is denied. Jury is admonished and trial is continued to March 28, 1961, 9:30 A M. Remanded.

• • • •

[File Endorsement Omitted]

[fol. J]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

Department No. 107

* * * *

Present Hon. CLEMENT D. NYE, Judge

235898

[Title Omitted]

MINUTE ENTRIES OF TRIAL AND VERDICTS—March 29, 1961

Trial is resumed with all jurors present as before. Deputy District Attorney H. George Taylor and the Defendant with counsel, F. Duncan, present. The counsel argue the cause. The jury is instructed and the Bailiff is sworn. At 11:20 A M, the jury retires to deliberate. At 4 P M, the jury returns with the following verdicts:

TITLE OF COURT AND CAUSE

"We, the Jury in the above entitled action, find the Defendant Joseph Lyle Stoner guilty of Robbery a felony as charged in the information and we further find it to be Robbery of the 1st degree".

This 29th day of March 1961, Ivan Roose, Foreman

"We, the Jury in the above entitled action, find the charge against the Defendant Joseph Lyle Stoner of being armed at the time of his commission of the offense as contained in the information true".

This 29th day of March 1961, Ivan Roose, Foreman

The verdicts are read. Jury is polled, all answer in the affirmative. Verdicts and instructions are filed. Jury is discharged. Judgment and sentence continued to April 6, 1961, 9 A M. Remanded without bail.

* * * *

[File Endorsement Omitted]

[fol. K]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

Department No. 107

* * * *

Present Hon. CLEMENT D. NYE, Judge

235898

THE PEOPLE OF THE STATE OF CALIFORNIA

vs.

JOSEPH LYLE STONER

JUDGMENT—April 6, 1961

Deputy District Attorney R. Remer and the Defendant with counsel, F. Duncan, present. Defendant's motion for a new trial is denied. Sentence as indicated.

Whereas the said defendant having been duly found guilty in this court of the crime of ROBBERY (Sec. 211 PC), a felony, as charged in the amended information, which the Jury found to be Robbery of the first degree and that defendant was armed as alleged; admitted prior convictions as alleged, to wit: Murder, a felony, Superior Court of the State of California, Riverside County, December 10, 1941 and served a term in the State Prison and Robbery and Grand Theft, a felony, Superior Court of the State of California, Los Angeles County, December 20, 1943 and served a term in the State Prison.

It is Therefore Ordered, Adjudged and Decreed that the said defendant be punished by imprisonment in the State Prison for the term prescribed by law.

Defendant is declared an habitual criminal.

It is further Ordered that the defendant be remanded into the custody of the Sheriff of the County of Los Angeles, to be by him delivered into the custody of the Director of Corrections at the California State Prison at Chino.

* * * *

[File Endorsement Omitted]

[fol. L]

[File Endorsement Omitted]

* * * *

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 235898

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

vs.

JOSEPH LYLE STONER, DEFENDANT

NOTICE OF APPEAL—filed April 14, 1961

WRITTEN NOTICE IS HEREBY GIVEN that the defendant, JOSEPH LYLE STONER, in the above-entitled action, appeals to the District Court of Appeal, Second Appellate District, State of California, from the judgment of the Court, made, given and entered on the 6th day of April, 1961, to-wit: Judgments of conviction of the crime of robbery in the first degree, in violation of Section 211 of the Penal Code; judgment and finding of habitual criminal pursuant to Section 644 of the Penal Code.

Defendant also appeals from the Order of the Court, made, given and entered on the 6th day of April, 1961, overruling and denying defendant's Motion for New Trial.

Defendant, JOSEPH LYLE STONER, appeals from the whole and each and every part of the said Orders and Judgment.

DATED: April 14, 1961.

/s/ Joseph Lyle Stoner
in pro per

[fol. 1]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

Department No. 107

HON. CLEMENT D. NYE, JUDGE

No. 235898.

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

vs.

JOSEPH LYLE STONER, DEFENDANT

REPORTER'S TRANSCRIPT ON APPEAL—March 27, 1961

APPEARANCES:

For the People:

H. George Taylor, Deputy District Attorney of Los Angeles County.

For the Defendant:

Frank Duncan, Esq.

MAX C. DECAMP, CSR.,
Official Reporter.

[fol. 3]

Los Angeles, Califorina, Monday, March 27th, 1961;
11:50 A.M.

THE COURT: People against Joseph Lyle Stoner.

Mr. Duncan, we won't be able to get a jury before two o'clock in this matter, but it just occurred to me that if the defendant intends to admit these priors that I would prefer to have him do it in the absence of the jury panel.

ADMISSION BY DEFENDANT OF PRIORS

MR. DUNCAN: Yes, your Honor. I have discussed this with the defendant and the defendant does desire at this time to admit the priors.

THE COURT: Is that true, Mr. Stoner?

THE DEFENDANT: Yes, sir.

THE COURT: You may rearraign the defendant on the priors alleged.

MR. TAYLOR: Joseph Lyle Stoner, in the amended Information No. 235898, it charges the first prior, prior to the commission of the offense set forth in the Information, that you were in the Superior Court of the State of California, in and for the County of Riverside, convicted of murder, a felony, and that judgment was rendered against you on the 10th day of December, 1941. Thereafter you served a term of imprisonment therefor in the State Prison.

Do you admit or deny this allegation of a prior felony?

[fol. 4] THE DEFENDANT: Yes, sir.

THE COURT: You admit it?

THE DEFENDANT: Yes, sir.

THE COURT: All right, sir.

MR. TAYLOR: A second prior, Mr. Stoner, alleges that prior to the commission of the offense for which you are on trial, you, in the Superior Court of the State of California, in and for the County of Los Angeles, were convicted of the crime of robbery and grand theft, a felony, and that the judgment of said court against you was rendered on December 20th of 1943. Thereafter you served

a term of imprisonment in the State Prison. Do you admit or deny this prior?

THE DEFENDANT: Admit that prior.

THE COURT: All right.

Now, there is another matter, Mr. Duncan, that I think we better discuss with you before we proceed any further.

MR. DUNCAN: Yes, sir.

THE COURT: I have checked the minutes and with the Judge in the matter. The Minutes show that on March 16th you were appointed by Judge Call in Department 110 because of a personal conflict between the defendant and the Public Defender. Now, that precludes, in my opinion and in the opinion of Judge Call with whom I have discussed it, a payment for your services under 987(a). In other words you were appointed, sir, [fol. 5] as an officer of the court.

MR. DUNCAN: Yes, sir.

THE COURT: And you understand that? There's no conflict in your mind? Although it may be an imposition in one sense of the word, you are willing to go ahead on that basis?

MR. DUNCAN: Yes, I am.

THE COURT: All right, sir. We will get the jury panel in at 2 o'clock. It is too late now to get it.

The witnesses are excused and instructed to return at that time, at 2 o'clock today without further order or subpoena.

(Whereupon an adjournment was taken until the hour of 2 o'clock P.M. this same date, March 27, 1961.)

[fol. 6]

Los Angeles, California, Monday, March 27, 1961;
2:00 P.M.

THE COURT: People against Joseph Lyle Stoner.

MR. TAYLOR: The People are ready.

MR. DUNCAN: Ready for the defendant.

THE COURT: Call a jury, please.

(Whereupon a jury was duly impaneled and sworn.)

THE COURT: Read the Information to the jury, please.

(Whereupon the Information was read to the jury, by the Clerk.)

THE COURT: Do you have an opening statement?
MR. TAYLOR: Yes, your Honor, just a brief one.
THE COURT: All right.

(Opening statement by Mr. Taylor)

THE COURT: We will take an afternoon recess before going into the evidence; and ladies and gentlemen, the Court admonishes you that during that recess it is your duty not to discuss among yourselves or with any other person any subject connected with this trial, and it is also your duty not to form or express any opinion in the case until it is submitted to you for your final determination.

You may go upstairs to the jury room which you will find just at the top of the stairs to the left, and we will call you down when we are ready to proceed.

[fol. 7] (Afternoon recess.)

THE COURT: The People against Joseph Lyle Stoner. Let the record show the defendant is in court with counsel, the District Attorney is present, the jurors are present and in their places.

You may call your first witness.

MR. TAYLOR: Mr. Greely, would you step forward, please?

DAVID GREELY,

called as a witness in behalf of the People, being first duly sworn, testified as follows:

MR. DUNCAN: Your Honor, I move the Court to exclude the witnesses from the courtroom.

THE COURT: Are there any witnesses in the courtroom?

MR. TAYLOR: Yes, your Honor, there is Donna, and then one of the two policemen. I'd like one of them to remain.

THE COURT: Well, one of the two policemen will be allowed to remain. The other will have to go outside the courtroom. All witnesses who expect to testify in this matter are excluded from the courtroom during the taking of testimony. They will remain in the hall to be called by the bailiff when needed.

THE CLERK: State your name, please.

THE WITNESS: David Greely.

[fol. 8] DIRECT EXAMINATION

BY MR. TAYLOR:

Q Mr. Greely, on October 25th of 1960, where were you employed?

A Budget Town Market in Monrovia.

Q Where is that located; what street?

A 706 West Huntington.

Q Is that West Huntington Boulevard?

A Yes.

Q What was your job there?

A Night clerk.

Q On the evening of October 25th of 1960, did something of an unusual nature occur?

A Yes.

Q What time of day or night was that?

A Approximately 8 o'clock.

Q When?

A Approximately 8 o'clock, five minutes after eight, eight o'clock.

THE COURT: P.M.? Five minutes after eight p.m.?

THE WITNESS: P.M.

Q BY MR. TAYLOR: All right. Tell us what happened.

A Well, I came back into the clerk stand and two men were standing there, one with the Pizza; and as I checked it out and opened the register, the defendant had a [fol. 9] .45 in his hand and told me to put all of the money in a paper sack.

Q You say "the defendant"; are you referring to Mr. Stoner, the defendant in this case here at the end of the table?

A Yes.
Q Did he have an object in his hand?
A He had a .45 in his hand.
Q Did you recognize that?
A Yes.
Q Was there anybody else with Mr. Stoner?
A Another young fellow was with him.
MR. TAYLOR: Your Honor, I have what appears to a .45 automatic pistol. It was People's Exhibit 1 at the Preliminary. May it be marked as People's Exhibit 1 for identification in this hearing?
THE COURT: Yes.
MR. TAYLOR: Counsel, have you seen this?
MR. DUNCAN: I don't think I have to. Thank you, Counsel.
Q BY MR. TAYLOR: Sir, I'm going to show you now People's Exhibit 1 for identification. Does this weapon appear to be the weapon that was in the hand of Mr. Stoner?
A Yes.
Q Tell us again what Mr. Stoner said to you.
[fol. 10] A I believe all he said was "Put all the money in the sack, all of it."
Q What did you do?
A I put all the money in the sack.
Q Where was this other person that was present?
A Standing beside him, on Stoner's right, facing me.
Q Do you know how much money you put in the sack?
A Well, approximately—we cashed a thousand dollars —including checks and the cash.
Q After you put it in the sack, what happened?
A He ordered me to lay down, which I did. And then—
Q You say "he", sir. There were two people present?
A Yes.
Q Was that Stoner or the other one?
A Mr. Stoner said for me to lay down, which I did.
Q Then what occurred?
A I believe he stood behind me and told me he was going to walk around a few minutes and leave. But by that time the other girl laid down on top of me.

Q Well, you say "the other girl". Now, who was that?

A Well, the girl who was in the store with me.

[fol. 11] Q What's her name?

A Donna Husby.

Q Is that the girl here that's a witness?

A Yes.

Q The one that was excused outside here?

A Yes.

Q Did you hear anything said to Donna to cause her to lay down?

A No, I didn't hear.

Q Did she come near where you were?

A Well, I was laying down, I couldn't see. The only thing I know is that she laid down on top of me.

Q What else happened?

A Well, we laid there until the lady come in the store and wanted to know what was going on.

Q This was a customer?

A Yes, it was.

Q Did you get up and look around at that time?

A I got up and called the police right off.

Q What was your reason for giving Mr. Stoner that money?

A I was faced with the alternative of the .45 or the money.

THE COURT: In other words, it was the gun that convinced you, is that right?

THE WITNESS: Very much, yes.

[fol. 12] Q BY MR. TAYLOR: You were in fear?

A Yes.

Q Do you know the name of the other person that was with Mr. Stoner?

A I do now, yes. I didn't know his name.

Q At a later time he became identified to you?

A Yes, he did.

Q What was the name of the other person?

A Peter Schales.

MR. TAYLOR: Your Honor, I wonder if we might inquire?

THE COURT: Will you have him step out, please?

Q BY MR. TAYLOR: Mr. Greely, I'd like you to look at this man right here in the custody of the Sheriff. Do you recognize him?

A Yes, I do.

Q Is that the other person?

A Yes, sir.

MR. TAYLOR: Would you state your name for the record, sir?

A VOICE: Eddie Schales.

THE COURT: Just go back in, Mr. Schales.

MR. DUNCAN: Your Honor, I wonder if we might approach the bench?

THE COURT: Yes.

(Whereupon the following proceedings were had at the bench, outside the hearing of the jury:)

[fol. 13] MR. DUNCAN: I'm going to assign the bringing out of that individual and his identification here in the courtroom as prejudicial misconduct on the part of the District Attorney, and move for a mistrial, citing People vs. Robarge.

THE COURT: Is the matter submitted?

MR. DUNCAN: Submitted.

MR. TAYLOR: Submitted.

THE COURT: Motion for mistrial is denied.

(Whereupon the following proceedings were had in open court, within the hearing of the jury:)

Q BY MR. TAYLOR: Did this all occur in the County of Los Angeles?

A Yes, sir.

MR. TAYLOR: Nothing further, your Honor.

THE COURT: You may cross examine.

CROSS EXAMINATION

BY MR. DUNCAN:

Q About what time of day or night did you say this happened?

A Approximately 8 o'clock. I'd say between five minutes of and eight o'clock, five minutes of eight and 8:00 P.M.

Q Now, this man that you say is the defendant, he came up to your stand, is that right?

[fol. 14] A Yes, he did.

Q About how far was he from you when he first spoke to you?

A Oh, from where I'm standing to the edge of this bench (indicating).

Q Maybe a foot and a half?

A At the most two feet.

Q And you were looking at him right full in the face, is that right?

A Yes, sir.

Q I take it at first you weren't frightened of him, were you?

A No. I rang the cash register.

Q And it was then he said something to you, is that right?

A Uh-huh.

Q After you had rung up the cash register?

A After I opened the register.

Q What was the first thing he said to you?

A "Put it all in a sack, put all the money in the sack." And then as I went to get it, he said "All of it."

Q And you did that, did you?

A I complied, yes.

Q And what type of sack was it that you put this money in?

A I believe it was a 12 pound paper sack.

[fol. 15] Q All right. Now, this other individual, where was he standing?

A He was standing to the right of Stoner, facing me.

Q And about how far would he be—he would be then to your left, is that right?

A He would be to my left.

Q About how far to your left was the other individual?

A In relationship to Stoner, or to me?

Q To you?

A Oh, about another foot and a half, three feet at the most.

Q Did this other individual say anything to you?

A No.

Q Then what was the next thing that happened after you gave this money over?

A He told me to lay down, lay down in the cash register.

Q And did you comply?

A Yes, I did.

Q Did he say anything else? Excuse me.

When you say he asked you to lay down, what were his exact words?

A "Lay down behind—lay down inside there."

Q And then what else happened?

[fol. 16]

A I believe he walked into the cash register, around, and said he was going to—going to walk around for a few minutes and then leave.

Q Was that the extent of the conversation you had with him?

A No. And then he asked me what was in the drawer. I told him "Nothing." He said why was it locked. I said it wasn't locked. And that was all of our conversation.

Q At no time was there any shot fired, was there?

A No, sir.

Q This other individual, did he say anything to you?

A No, not a word.

Q About how much money did you part with?

A Estimated a thousand dollars or more, including cash and checks.

Q Well, about how much in cash?

A Oh, eight hundred dollars.

Q All right. Now, you described this man, did you not, that held the gun, to the police, didn't you?

A Yes, I did.

Q And how did you describe him to the police?

A Well, I just—I described him as 35 to 40 years old, I believe, five-ten, wearing a gray shirt, gray sweater and a gray hat, swarthy complexion. I believe that's [fol. 17] all. Wearing glasses, excuse me; wearing horn-rimmed glasses.

Q Anything unusual about the glasses?

A No, only that they were horn-rimmed.

Q And you say this man had a gray sweater on?
A Gray coat sweater.
Q Now, some time thereafter did you see Mr. Stoner in a line-up?
A I didn't see him in a line-up. They took me to the Temple City Sheriff's Station and these three men come in, and I knew him as soon as he stepped in the door before they had a line-up.
Q Well, these two other men that you saw, they were supposed to be suspects in this case?
A I don't know. They just had two other men there, I believe.
Q Well, one of them was about 6-foot, 4-inches in height, wasn't he; a big man?
A I don't remember.
Q Well—
A I know one was small.
Q Yes, he was about five-one, wasn't he, and a Mexican—appeared to be a Mexican, Spanish origin?
A Seems to me, yes, there was, facing me on the left-hand side.
Q And Mr. Stoner was the only man of what one [fol. 18] might call average height, isn't that right?
MR. TAYLOR: Well, your Honor, this word "average" I think would be too ambiguous.
MR. DUNCAN: I will withdraw the question.
Q BY MR. DUNCAN: He was the only man that was in the vicinity of five-eight or five-nine or five-ten or five-eleven, wasn't he?
A I don't believe so. They were all similar height, seems to me.
Q Pardon me?
A They were all similar in height, seems to me. Not so much difference between five and six feet.
Q Well, there were only three men there, wasn't there?
A I believe there was only three.
Q And one was very short, wasn't he?
A Doesn't seem to me he was so very short. He was slight, not short.

Q Is it your testimony that all of these three men that you saw, the two men in addition to Mr. Stoner were around Mr. Stoner's height?

A It seems to me they were, yes.

Q By the way, these two other individuals, were they also between the ages of 35 and 40?

A I don't recall. That was in October. It's quite a ways for me to remember. However, it seems to me [fol. 19] two of them may have been that; and there was one, the man on my left, seemed to be around 21 or 25.

Q By the way, did you see this other fellow in the line-up?

MR. TAYLOR: By "other fellow"—

MR. DUNCAN: The other fellow that was there at this holdup?

THE WITNESS: No.

Q BY MR. DUNCAN: I assume that right after this took place, after this robbery, you reported it to the police?

A Yes, I did.

Q Now, I assume that some police came up and talked to you, is that right?

A Yes, they did.

Q They asked you to describe these fellows that had taken this money, didn't they?

A Yes, they did.

Q And you told them, isn't that right? You gave some type of description?

A Yes, I did.

MR. DUNCAN: I move the Court, your Honor, for permission to inspect the robbery report.

THE COURT: Do you have it?

MR. TAYLOR: There's no objection whatsoever.

THE COURT: All right; let counsel have it.

[fol. 20] Q BY MR. DUNCAN: Sir, how did you descrige to—

THE COURT: Pardon me just a moment. Let the record show pursuant to his request, counsel has been handed by the District Attorney what counsel has referred to as the robbery report, and that he has inspected it. That is correct, is it, Mr. Duncan?

MR. DUNCAN: That is correct, sir.

THE COURT: All right, sir.

Q BY MR. DUNCAN: Now, this man that you say is Stoner, how did you describe him to the police as far as his weight is concerned?

A Like I say that was in October; however I think I said around 155.

Q You told them that he weighed 160 pounds, didn't you?

A Like I say, as much as I remember I said 155.

THE COURT: That's around 155, isn't it, Mr. Duncan?

MR. DUNCAN: Well, it's around, I suppose.

THE COURT: That's what the witness just testified to. He said he told them he was around 155.

Q BY MR. DUNCAN: Well, you told the police he was approximately 45 years of age, didn't you?

A Yes, I did.

Q Did you tell the police that this man had a gray complexion?

A Yes, I believe I did.

[fol. 21] Q What did you mean by that?

A Pallid, maybe.

Q Now, this second man; about how old did you tell the police you thought he was?

A I don't believe I remember. I remember I told them I thought he was younger than I was; however, I—I am not sure what I told them right now.

Q How old are you, sir?

A I'm 36—37.

Q Did you tell them that you thought he was approximately 35 years of age?

A I may have.

MR. TAYLOR: This matter refers to the second man?

MR. DUNCAN: That's right.

THE WITNESS: I'm not sure right now.

Q BY MR. DUNCAN: Is there anything unusual about the face of this man that you say was Stoner?

A Just repeat that, please?

Q Anything unusual about his face; any scars, any identifying marks at all?

A No, I don't believe so.

Q You told the police, did you not, that he had on a gray jacket, didn't you?

A Yes, I believe I did.

Q You didn't tell the police anything about it being a sweater jacket, did you?

A Seems to me I did.

[fol.22] Q Did you notice anything unusual about this man's hair, say the color of it?

A I couldn't see his hair. He was wearing a hat.

Q Well, could you see his sideburns?

A No, I didn't see his sideburns. He was facing directly toward me.

Q Could you see his eyebrows?

A He had horn-rimmed glasses on and I couldn't. They looked dark to me, that's all. I never saw his eyebrows as a matter of fact.

Q It is your testimony that they looked dark, or is is your testimony that you didn't see them?

A I would say I didn't see them, because I was looking at the glasses.

Q Can you tell us anything about the color of his eyes, or anything of that nature?

A No.

Q Was the man wearing gloves?

A No, he wasn't.

Q Did you notice anything unusual about his hat?

A No, sir.

Q Can you tell us anything about him that you haven't told us thus far?

A No.

Q Can you tell us anything unusual about his teeth?

[fol. 23] A No, I don't remember noticing his teeth.

Q You didn't notice his teeth when he talked?

A No, sir, I didn't.

MR. DUNCAN: I have no further questions.

THE COURT: That's all, Mr. Greely.

MR. TAYLOR: May I have some redirect, your Honor?

THE COURT: All right.

MR. TAYLOR: Your Honor, I have a gray hat. May this be marked as People's Exhibit 2 for identification?

THE COURT: A hat?

MR. TAYLOR: Yes.

THE COURT: It will be so marked.

REDIRECT EXAMINATION

BY MR. TAYLOR:

Q Do you recognize People's Exhibit 2 for identification?

A It looks like the hat he was wearing.

MR. TAYLOR: I have a pair of horn-rimmed glasses, your Honor. May the record reflect they appear to have some sort of paint spots across the front of them? May this be marked as People's 3 for identification?

THE COURT: So marked.

Q BY MR. TAYLOR: Showing you People's 3 for identification, sir, do you recognize those glasses?

A They look like the type he had on, yes.

[fol. 24] MR. TAYLOR: Your Honor, I have what appears to be a gray coat. May this be marked as People's 4 for identification?

THE COURT: It will be so marked.

Q BY MR. TAYLOR: Showing you this gray coat, sir, do you recognize that? Why don't you pick it up and look at it?

A Yes, it looks like the type of coat he was wearing; however—

Q I take it as to these things you can't be absolutely positive, but they look like the coat, hat, and glasses?

A They look like the hat he had on.

Q How about the coat; does that look like the coat?

A Yes, it does.

Q Do you have any doubt that the man that robbed you on that evening was this defendant here, Mr. Stoner?

A No, sir.

MR. TAYLOR: No further questions.

THE COURT: Any further questions, Mr. Duncan?

MR. DUNCAN: I have no further questions.

THE COURT: That's all, Mr. Greely. You may step down.

MR. TAYLOR: Call Donna Husby.

THE COURT: May Mr. Greely remain in the court-
[fol. 25] room now, Mr. Duncan?

MR. DUNCAN: As long as he is not going to testify.

THE COURT: Well, he might be called in rebuttal. You better go outside, Mr. Greely.

DONNA MAY RAY,

called as a witness in behalf of the People, being first duly sworn, testified as follows:

THE CLERK: State your name, please.

THE WITNESS: Donna May Ray.

DIRECT EXAMINATION

BY MR. TAYLOR:

Q Is that Miss or Mrs?

A Mrs.

Q Mrs. Ray?

A Uh-huh.

Q Now, you say "uh-huh." We don't know whether that means yes or no.

A Yes.

Q In the past has your name been Husby?

A Yes.

Q That was your maiden name?

A Uh-huh, yes.

Q On October 25, 1960, were you in the vicinity of the Budget Town Food Market in Monrovia?

A Yes, I was.

[fol. 26] Q Were you there in the evening?

A Yes.

Q Were you a customer there, or did you work there, or what?

A I was working there with my father.

Q Did something unusual happen on the evening of October 25, 1960?

A Yes.

Q Tell us in your own words what happened?

A Well, I was over answering the telephone and these two men walked in the back door. I didn't pay attention to them because customers usually walk through. And I went into the back room to clean some spits, and I was back there and I came out to get a towel; and this man told me to come over and lay on the floor with David. Well, I didn't see David—

Q You're talking very very fast here, and you're leaving me behind. What do you mean you were cleaning some spits?

A Well, my father barbecued chickens and I was cleaning them.

Q Does he have a stand there, or something?

A Yes, he owns the—was working in the meat department over there.

Q I see. And you helped him in that kind of work?

[fol. 27] A That night, uh-huh.

Q This back room that we're talking about, where is that?

A That was located— well, it was in back of the coolers.

Q Did some person, some man, come into that back room while you were there?

A I had walked out to the front and picked up a towel, and he was standing there with the gun.

Q You had walked out to the front of where?

A To the meat department.

Q Was there somebody standing there with a gun?

A Yes.

Q Would you be able to recognize that person? If you saw that person today?

A Yes, I would.

Q Look around the courtroom and tell me if you see him here?

A Yes, I see him sitting right over there. (Indicating).

Q You're referring now to the gentleman with the red hair here at the end of the counsel table (indicating)?

A Yes, I am.

Q Showing you the gun before you that's heretofore been marked as Exhibit 1 for identification, would you like to look that over? Does that gun appear familiar [fol. 28] to you?

A Yes, this is the gun he had held.

Q You're talking about Mr. Stoner?

A Mr. Stoner.

Q What did Mr. Stoner say or do when you noticed him with the gun?

A He was—there was this little passageway from the grocery to the back of the meat counter, and he said to me, he says, "Go over there and lay on the floor behind the counter by Mr. Greely." Well, I wasn't going to argue with him.

Q Did he use the name "Mr. Greely"?

A No, he just told me "with the clerk." So I went over there and I laid on the floor, because he had the gun and I wasn't about to argue with a gun pointing at me.

MR. DUNCAN: Your Honor, I am going to move to strike that as not responsive.

THE COURT: Yes, the latter part may go out and the jury is instructed to disregard it.

Q BY MR. TAYLOR: Were you in fear at the time that you went over where Mr. Greely was?

A Yes, I was.

Q When you get over there, what did you do?

A I laid on the floor.

Q Did you see anybody else around at the time that [fol. 29] this was going on.

A Well, there was another man, but I—I had saw him when I had come out of the front, from the back room, when I picked up the towel. They had walked in together.

Q Now, would you be able to recognize that other man if you saw him today?

A No, I didn't really get that good a look at him, so I wouldn't swear to it.

Q In the market did you talk to this other person?

A No, I did not.

Q Do you recall what Mr. Stoner was wearing when he had the gun in his hand?

A Yes, I do; he was wearing a hat and a jacket.

Q Now, I think the hat has been heretofore marked as People's Exhibit 2 for identification. Do you recognize that?

A Yes, I do.

Q And the jacket I think is marked as People's Exhibit 4 for identification. Do you recognize that?

A Yes.

Q The hat and the jacket, do they appear to be what Mr. Stoner was wearing?

A Yes, they do.

Q Anything else Mr. Stoner was wearing?

A He was wearing glasses.

[fol. 30] Q There are some glasses before you. I think they have been marked as Exhibit 3 for identification.

A Those were the glasses.

Q Did you see anything in the hands of Mr. Stoner, other than the gun?

A No, I didn't.

Q Did you see the bag of money?

A No.

MR. TAYLOR: I have nothing further.

THE COURT: Cross examine.

CROSS EXAMINATION

BY MR. DUNCAN:

Q You say that those glasses in front of you are the glasses that this man wore. Is there anything unique about that pair of horn-rimmed glasses that mark them or distinguish them from other horn-rimmed glasses that you have seen?

A No.

Q So when you say those are the glasses you don't really mean that, do you?

A Well, the way I looked at him, I mean—they were glasses that were on him. I remember seeing glasses on him, and they were glasses that I could see through.

Q Yes. But they're all glasses you can see through?

A You mean the color of them?

[fol. 31] Q Well, you said that these glasses before you are the glasses that this man wore. Now, isn't it a fact that what you mean to say is that the glasses this man wore were similar to those glasses before you?

A Well, I guess that's what you might say, yes.

Q I mean it could have been another pair of glasses with an entirely different prescription and different frame, isn't that right?

A They could have been, yes.

Q All right. Now, what about this gun? What kind of gun was it?

A It was a .45 caliber.

Q All right. Now, the police told you that it was a .45 caliber?

A Well, I—I mean—I—when I saw the gun. I knew that was the gun because I saw it in his hand.

Q Well, did you know it was a .45 caliber when you saw it?

A Well, I thought that's what it was. I didn't know for sure that it was a .45 or not. That's what we had told them when they asked us.

Q I see. Now, isn't that what the clerk told the police and you heard the clerk tell the police he thought it was a .45?

A Well, when we were standing there we were both saying that.

[fol. 32] Q And you said so too?

A Yes.

Q Now, I take it then you are somewhat familiar with firearms, is that right?

A Well, I have seen a few, yes.

Q Now, is there anything unique about that particular .45 caliber automatic that makes it or distinguishes it from other .45 caliber automatic weapons?

A Well, I haven't seen all kinds; but when I—I mean I don't exactly understand what you want me to—

Q Well, your testimony was that it was that particular gun that this man held on you. Now, I want to know how you think it is or what makes you think that this weapon is unique so that you can say it's that weapon and not one of a similar make and model?

A Well, I have—the way he was holding it. I could only see the pistol part of it.

Q What do you mean "the pistol part of it"?

A Well, the stem that's sticking out. I mean I didn't just glare at it. I mean I wasn't going to waste any time to get over there.

Q Well, what is this stem you're talking about? I'm not familiar.

A This part right here. (Indicating)

Q You're talking about the barrel?

A This right here. (Indicating) Well, whatever you [fol. 33] call it.

MR. TAYLOR: May the record reflect, your Honor, she has now indicated the business end of the gun.

THE COURT: The barrel?

MR. TAYLOR: Yes, sir.

Q BY MR. DUNCAN: All right. Now, when you saw this weapon, People's 1 for indentification, was it like it is here now?

A Yes.

Q With this "business end" as it's been termed by Mr. Taylor, sticking out?

A Yes.

MR. DUNCAN: May the record indicate that when the gun is in this position, that the—

THE COURT: Wait a minute, are you testifying?

MR. DUNCAN: All right. We'll get an expert in.

Q BY MR. DUNCAN: Well, how was this man dressed?

A Stoner?

Q No, this man you say—

A This man I saw? He had on a gray hat. He had on glasses.

Q Now, by the way, you have seen that gray hat before you came here in the courtroom, haven't you, down at the police station?

A No, I did not see it down at the police station.

[fol. 34] Q When is the first—forgotting about this robbery, when was the first time you had seen that gray hat?

A The first time I saw this hat was in the—the first time I appeared in court.

Q That was at a preliminary hearing?
A No, it was not, it was down here.
Q Well, there were no court proceedings on that day, was there.
A Well, I—
Q I mean there was no trial?
A No, there was no trial.
Q Who showed you that?
A I just saw him carrying it. They never told me it was his.
Q And what about that gray jacket?
A I didn't actually recognize, you know—they didn't say it was his jacket or anything.
Q And you don't now recognize it as the jacket—
A Yes, it was the jacket that Stoner was wearing.
Q You are sure it wasn't the sweater he's wearing right now?
A No.
Q Positive of that now?
A Well, it was—it was a jacket. I didn't notice, but it looked like this jacket because it was a—it wasn't [fol. 35] bulky or anything like that.
Q Could have been, I suppose, another jacket, not specifically that jacket?
A It was a short jacket.
Q All right. And it was gray in color?
A Yes, it was.
Q And by the way, did you see Mr. Stoner down at the police station at any time?
A Did I see him down at the police station at any time? Yes, I was—saw him down there.
Q When was that?
A We were called in—oh, I can't remember. It was about the first or second of November. I don't remember actually the day. It was around in there some time.
Q I assume that you had some conversation with some police officer prior to going down there?
A Before I went down there?
Q Yes.
A The only time I had talked to him was when—the night of the holdup and when they came to get a description.

Q When did they come to get the description?

A I think it was the day after or so. I can't be exactly sure.

Q How did you describe this man?

[fol. 36] A This man? I described as—

MR. TAYLOR: There's been two people.

Q BY MR. DUNCAN: The only man you can describe. The other man you can't identify, can you?

A No, I cannot.

Q All right, this man you can identify, you think you can; how did you describe him for the police on that day?

A I described him as wearing a gray jacket and hat and glasses, and I couldn't see his hair, and I couldn't see his eyebrows very well; and I said possibly I could see a moustache, the way the lights were shining on it.

Q Now, when you saw Mr. Stoner down at the police station, did the police tell you that they had the man that had robbed the store?

A No, they didn't.

Q What did they say to you?

A They said they had—they had us look at several before.

Q You mean on the same day?

A No.

Q When did they have you look at these other suspects?

A They had brought them up to the store.

MR. TAYLOR: Object to that word "suspects".

MR. DUNCAN: Well, I would assume that they would be suspects. I will withdraw the question if you [fol. 37] don't like the word "suspects".

THE COURT: All right, it is withdrawn.

Q BY MR. DUNCAN: But they brought some people down to the store?

A They brought them so we could look at them and see if we could identify any of them, if they looked like the men or not.

Q Now, are you talking about the physical person, or photographs?

A They brought down some people.

Q These people appear to be in custody at the time?

A Well, I—if they were in custody or not, I don't know.

Q Did they have handcuffs on them?

A No, they did not.

Q How many people did they bring down and ask you to look at them?

A Four.

Q Mr. Stoner wasn't one of those men, was he?

A No, he wasn't.

Q Did you identify any of those four people they brought down?

A No.

Q How did these other four people look?

[fol. 38] A Well—

Q Describe them?

A Well, I can't exactly remember what they looked like.

Q Well, did they—were they similar in height?

A No, they weren't.

Q To Mr. Stoner?

A They had no resemblance whatsoever.

Q And any of the people, by the way, that they brought down, were any of these four people colored?

A No, they weren't. Let's see now, a couple of them were kind of dark complected, but that was all. I mean they weren't—

Q Maybe Mexican or Spanish descent?

A Yes.

Q Did they ever show you what we sometimes term as mug shots or any photographs of people?

A Yes, they did.

Q Did you pick out any photographs as possible—

A Not as definite possibles of what you say might have resembled in just certain ways, but they had brought down these—I don't know what they call them. You put them together, you know, once you tell them what they look like.

Q Have one of those artists; sort of a composition?

A It was,—they're in plastic sheets, you know, differ-

[fol. 39] ent eyes and hair, stuff like that.

Q Anyone ever draw a picture for you?

A No, not except on those plastic sheets, that was all.

Q Who was it that brought these plastic sheets down?
A I—I can't remember who they were.
Q This gentleman seated here at the counsel table (indicating)?
A Oh, I—I can't remember. I don't think—I don't think it was them.
Q All right. Anyway, I take it that you picked out some pictures as possible suspects, or am I stating it correctly?
A We had looked at them. We didn't pick out anybody and say that could be him definitely.
Q Well, did you say "Maybe", but not—
A A couple of times; but after—and then after I went through them again, we eliminated. We couldn't find any at all.
Q All right. Now, do you know in any of those pictures, do you know if any of them depicted Mr. Stoner?
A I saw a picture that was taken of Mr. Stoner and I didn't know him at the time, that it was his photo; but I did see it and identfied it as him.
Q All right. Now, when was this?
[fol. 40] A This was maybe about five days later or so; I can't be sure how many days after it was.
Q And is there any way that you might refresh your recollection on that; any record you might have? Can you pin it down to the precise date, or within one day of it anyway?
A No, I—I really couldn't pin it down to exactly the day, but it wasn't too long afterward.
Q Within a week?
A Yes, at least.
Q And probably less time than a week, is that it?
A Yes.
Q Would you say a week would be the maximum time, that is, seven days after this occurrence; within seven days that you definitely saw this picture of Mr. Stoner?
A Well, I think it was. I mean I can't really be positive. I know—I'd say it was.
Q Was it on the first occasion that you were shown photographs?

A No, it wasn't.
Q The second occasion?
A It was the second occasion.
Q How many times altogether did you see photographs?
A Twice.
Q Now, when you saw Mr. Stoner down at the police [fol. 41] station, you—you did see him down there, didn't you?
A Yes.
Q Did you see him with two other individuals?
A Was he with two? Yes.
Q One of those other individuals was a man considerably shorter than Mr. Stoner, isn't that right?
A That I can't remember.
Q Well, you recall a dark complected fellow, about five-one inches in height?
A I can't remember.
Q Well, can you remember a man that appeared to be of Mexican or Spanish origin?
A Well, I had saw him the first time.
Q Now, are you talking about—when you say "the first time"—
A That was the first time I had eeen anybody. When I saw Mr. Stoner's picture, was the one time I saw him —I mean the photo of him.
Q I am talking about the line-up when you saw him in person. Did you ever see him in person before you went to court?
A No.
Q So you didn't see him in the line-up?
A No.
Q Is that your testimony?
A Yes.
[fol. 42] Q This second individual, can you tell us anything at all about his description?
MR. TAYLOR: "This second individual"—I object as being ambiguous.
MR. DUNCAN: The second individual that was there at the time of the robbery.
THE COURT: What is your question about it?

Q BY MR. DUNCAN: Can you tell us anything? In other words, you just don't know anything about the other individual?

A No.

Q Except there was a second individual, is that right?

A Yes, there was.

Q Now, did you have some conversation with the police prior to picking out this photograph of what you say was Stoner?

A Had I talked to them before?

Q Yes. What did they tell you before they showed you this photograph of Stoner?

A They asked me if I had ever—if this picture looked like the man that held us up. That was all they said. And I told them, "Yes, it did."

Q And by the way, was Greely present when this photograph was shown to you?

A No, he was not.

[fol. 43] Q Anyone present other than an officer?

A No.

Q When was the first time you saw Stoner here?

A The first time I—

Q After this robbery?

A Was in court.

Q What court was that?

A That was at Monrovia.

Q That was at the time of the preliminary hearing?

A Yes, it was.

Q By the way, had you ever seen Mr. Stoner prior to the 25th of October?

A No, I had not.

Q And subsequent to the 25th of October, the first time you saw him was in the courtroom, is that right?

A That's right.

Q You mentioned that you couldn't see this man's eyebrows. Is there any reason why you mention eyebrows specifically?

A Well, they asked me and I couldn't see it because they asked me what color his hair was, and I could not see his hair. His eyebrows, the little bit that I could see, they did look dark.

Q Did they look black?

A Looked dark. I couldn't—I wouldn't give—I wouldn't say it was a dark black or a brown or anything [fol. 44] else. I said I couldn't see him. I couldn't tell them if they were blond, if they were red, or any other color. I said they looked—I couldn't tell with the glasses on what color they were exactly.

Q Well, when you first saw this man you say is Stoner, was he facing Mr. Greely?

A When I first saw him?

Q Yes.

A Well, I had seen him when he walked in the door but I didn't really look at him, just stare at him; but when he came back and asked me to go over there and lay on the floor with Greely, I was face to face with him.

Q Did you ever see his profile?

A Yes, I had saw sideviews of him.

Q When was that; after he ordered you—

A Yes, he had turned sideways so I could come through.

Q Did you see his face at that time then?

A Yes. When I came out, he was standing right in front of me and I was—could see right directly at him.

MR. DUNCAN: Mr. Stoner, I wonder if you would stand up.

May Mr. Stoner come over here, your Honor?

THE COURT: Yes.

[fol. 45] MR. DUNCAN: Near the witness?

THE COURT: Yes.

Q BY MR. DUNCAN: You notice, do you not, that Mr. Stoner has rather full eyebrows?

A Yes, I do.

MR. DUNCAN: Put on these glasses, Mr. Stoner.

Q BY MR. DUNCAN: Do you see his eyebrows now?

MR. TAYLOR: Well, your Honor, I don't think it's under the same circumstances. Unless he puts on the similar hat, I will object.

MR. DUNCAN: Well, put on the hat.

THE WITNESS: That's him.

Q BY MR. DUNCAN: Well, you see his eyebrows now, is that right?

A Yes; but the way the light was actually on him, I could not tell.

MR. DUNCAN: By the way, would you turn profile, Mr. Stoner?

Q BY MR. DUNCAN: You see his hair now?

A Yes.

MR. DUNCAN: All right. Mr. Stoner, I wonder if you would face the jury so the jury might see your eyebrows. And would you also turn profile so they might see your hair. Thank you, Mr. Stoner.

Q BY MR. DUNCAN: Now, this hat, is this the hat that Stoner was wearing?

[fol. 46] A Yes.

Q And you noticed this hat band specifically, is that it?

A The way I described it, yes. That was the one—the way it looked.

Q But you remember specifically this hat band, don't you?

A Not specifically, but I think—I knew it was a different shade of gray from the hat, you know. I mean it blended in with it.

Q And you can recall specifically now looking back at the time that this robbery took place, you can remember specifically about the hat band being of a different shade of gray and black than it appears here today?

A Not all the definite colors in it, but I do say—I said it had a band.

Q Well, what I'm trying to pin you down on is: You're very very definite that this is the hat?

A Yes, I would say it is.

Q All right. And you're positive about that?

A Yes, I am.

Q All right. And you even remember that little feather there on the side, don't you?

A I said it had feathers in it, but I wouldn't—

Q O.K. That's all I wanted to know.

[fol. 47] MR. DUNCAN: I have no further questions.

MR. TAYLOR: A couple of questions, your Honor.

THE COURT: All right, go ahead.

REDIRECT EXAMINATION

BY MR. TAYLOR:

Q At the preliminary hearing, did you—strike that. At the preliminary hearing, did Mr. Greely testify, or do you know?

A That, I cannot remember. I really can't.

Q I'd like to show you People's Exhibit 1, the gun. I show you two positions; first, where the slide is back, then if I could get somebody to—I show you again the gun with the slide forward. Now in which position was it when Mr. Stoner had it in his hand?

MR. DUNCAN: Your Honor, I'm going to object on the ground this is impeaching his own witness. Testimony has been very definite on it.

THE COURT: Objection is overruled.

THE WITNESS: Which one was it?

Q BY MR. TAYLOR: Yes. Was it forward like it is now, or was the main part of the gun back?

A I'm—I think the main part of it was like this (indicating).

Q That is to say forward?

[fol. 48] A Forward, uh-huh.

MR. TAYLOR: That's all I have. No further questions.

THE COURT: Anything further, Mr. Duncan?

MR. DUNCAN: Yes.

RECROSS EXAMINATION

BY MR. DUNCAN:

Q What did you mean by "the business end"?

MR. TAYLOR: I don't think she used that term.

MR. DUNCAN: Well, in response to a question that was asked.

THE COURT: It was he that said that.

Q BY MR. DUNCAN: You heard the reference "business end," didn't you, by the District Attorney here?

A Yes.

Q What did you think he meant by "business end" when you were answering the question?

A The end I was pointing at.

Q And you specifically remember, don't you, this particular—I can't hold this thing back here, but the barrel here, the round barrel?

A Yes.

Q All right. By the way, what color did you describe this gun as to the police?

A Well, I don't remember exactly how I described it in every detail.

[fol. 49] Q Well, just any old detail.

MR. TAYLOR: Well, now your Honor, I think we're almost getting argumentative.

THE COURT: Yes. The witness has stated she doesn't remember, Mr. Duncan.

MR. DUNCAN: Well, if that's the witness' testimony, I will accept it; but—

THE COURT: Well, that's the witness' testimony.

Q BY MR. DUNCAN: It's your testimony that you do not recall now how you described the gun?

A That is right.

Q By the way, you didn't testify at the preliminary, did you?

A No.

Q Did you ever hear Mr. Stoner speak at the preliminary?

A Yes, I did.

MR. DUNCAN: I have no further questions.

THE COURT: That's all, Mrs. Ray.

MR. TAYLOR: I wonder if these two first witnesses could be excused?

THE COURT: If you are through with them, they can.

MR. DUNCAN: I would request that Mr. Greely be present tomorrow.

THE COURT: All right. Do you want Mrs. Ray?

MR. DUNCAN: No.

[fol. 50] THE COURT: You may be excused permanently, Mrs. Ray. Have Mr. Greely come in and we will instruct him.

You will return tomorrow morning at 9:30, Mr. Greely.

• • • •

[fol. 51] MR. TAYLOR: The People will call Peter Schales.

PETER SCHALES,

called as a witness in behalf of the People, being first duly sworn, testified as follows:

THE CLERK: State your name, please.
THE WITNESS: Peter Schales.

[fol. 52] DIRECT EXAMINATION

BY MR. TAYLOR:

Q Mr. Schales, on the 25th day of October, 1960, were you in the Budget Town Food Market in the City of Monrovia?
A At what time?
Q At any time during that day, sir.
A Yes.
Q What time of day did you go there?
A I don't remember exactly the time.
Q Do the best you can to approximate it?
A In the evening, at night.
Q Around six, seven, eight; just when?
A Around 7 o'clock.
Q Did you go there with another person?
A Yes, I did.
Q Who did you go to the Budget Town Food Market with?
A Mr. Stoner.
Q Is that the defendant in this case, the man here at the end of the table?
A Yes, it is.
Q Had you discussed anything with Mr. Stoner or made any sort of plans or arrangements prior to going to the food market?
A Yes, we were planning to try and get some money—

[fol. 53] MR. DUNCAN: Your Honor, I am going to object and move to strike that as not responsive.

THE COURT: The answer from and after the word "Yes" is ordered stricken. The "Yes" will remain.

Q BY MR. TAYLOR: Would you tell us, sir, any conversation that you had with Mr. Stoner, as best you can recall it; what Mr. Stoner said and what you said relative to the plans to go to the Budget Town Food Market?

A Well, actually it was no big plan in mind, just the fact that we—

THE COURT: What was said, Mr. Schales? What was said between you.

THE WITNESS: Well, we approached the market—

Q BY MR. TAYLOR: What I want to know is what you said and what Mr. Stoner said prior to either of you going into the market?

A I don't remember exactly what was said.

Q Well, as best you can recall it, sir.

When was the first time that the food market was discussed?

A Well, the actual market wasn't discussed, but the fact that we wanted to go to the market when we drove by it; said "This looks like a good spot".

Q Who said that?

A I don't know if it was myself or Joe.

Q After this remark was said "This looks like a [fol. 54] good spot", what happened?

A Well, we parked the car.

Q Now, prior to the remark "This looks like a good spot", had you and Mr. Stoner talked over anything?

A Yes, we had planned to—

Q Now, you're using this word "plan" and that's your conclusion. The jury will decide whether or not there was a plan.

What I want you to do is to tell us, as best you can recall, what you said and what Mr. Stoner said.

A Well, we wanted to—well, I said I wanted some money. I was in need of money. I wanted to get back to New York City. And I don't know, we both agreed on this, that we both needed money. We had agreed on

robbing one super market, some super market, no one in particular.

MR. DUNCAN: Move to strike "we agreed we were going to rob a market, a super market" as a conclusion of the witness.

THE COURT: That's ordered stricken. The jury is instructed to disregard it.

Q BY MR. TAYLOR: See, you used that word "agreed," and that's a conclusion.

What did Mr. Stoner say, as best you can recall it, that would lead you to believe about an argument? Tell us the conversation.

A Well, the fact that he mentioned that he needed [fol. 55] money and I needed money, he said, "Let's get it. I know a way to get it, an easy way to get it."

Q What did you say?

A Well, at first I didn't go along with the idea.

Q Well, what did you say to not go along with the idea?

A Well, I told him it was wrong, the first time he approached me with this.

Q At a later time in the conversation, did the topic about needing money come up again?

A Yes, we discussed it after that, both of us needing money, and the suggestion came up again.

Q Who made the suggestion?

A Well, Mr. Stoner and myself. I went along with it after a while.

Q Tell us what he suggested, and then tell us what you said to go along with it?

A Well, actually what he had suggested that we go out one night—

Q Is this what he said?

A Well, he said we could go out and find a spot with not too many people, and he'd go in and get the money we needed.

Q What did you say?

A I went along with the idea.

Q What did you say to go along with the idea? [fol. 56] A I said "Yes".

Q Did you nod your head, or say "Yes", or what?

A Yes, I said "yes."

Q Did you make any further conversation now about the details as to how this was to be accomplished?

A No, the details was very vague. The fact that—

Q Tell us the conversation or plans that you and Mr. Stoner made relative to the details of how you were going to get this money?

A Well, there was the fact that he had obtained a gun from a friend.

Q Who said that?

A The fact that he had the gun.

Q Did Mr. Stoner tell you something about a gun?

A He said he could obtain a gun from a friend.

Q Aside from that, was there any discussion of the details, that you can now recall?

A Well, with the gun he had intended to go to some place of business and get some money.

Q Now, after the car was parked on October 25th of 1960, were you parked in the vicinity of the Budget Town Food Market in Monrovia?

A Yes.

Q Was there any conversation at that time between yourself and Mr. Stoner about how the plan was to go ahead?

[fol. 57] A Well, we had decided upon—well, Mr. Stoner said we would both approach the super market and walk in and buy I think it was a Pizza pie we picked; and I would walk out with the money. This was the plan in mind after we approached the register.

Q Did you enter the Budget Town Food Market?

A Yes.

Q Where was Mr. Stoner at that time?

A He was with me.

Q Had you seen any sort of weapon or anything of that nature in Mr. Stoner's possession?

A Yes.

Q When did you see it?

A Well, the first time I saw it was a few days before the robbery.

Q I'd like to show you the exhibit, People's 1 for identification. Have you ever seen anything like that?

A Yes.

Q Does that appear to be the weapon that Mr. Stoner showed you?

A Yes.

Q Did you see it on the night of the robbery?

A Yes, I did.

Q - was this before you made the entry to the store?

A Yes, I saw it a few days before we made the entry into the market..

[fol. 58] Q On the evening before you—

A Yes.

Q —went into the market?

A Yes, just before we went in I saw it.

Q Tell us what happened after you entered the market?

A Well, we walked to the back of the store and the store was vacant, with no people in the store. And we picked up a frozen Pizza and brought it up to the register. And then as the clerk was wrapping the package I think Mr. Stoner drew the gun. And after that I think he asked for the money. At first the clerk—I guess he was kind of dazed, but when he took another look at the gun he put the money in a paper sack. And that's when I walked out of the store with the money.

Q You took the money out?

A Yes, I did.

Q After you got outside of the store, did Mr. Stoner join you?

A Yes.

Q Where did you go?

A Well, we drove around for a while. We didn't go anywhere in particular, just drove around. I was driving the car part of the time. And after a while Mr. Stoner took over.

Q And where did you ultimately go?

[fol. 59] A Well, I went back to where I was living at the time, the Y.M.C.A.; and Mr. Stoner went to his hotel, I believe.

Q Do you know the name of that hotel?

A I think it's the Mayfair.

Q What happened to the money that you took out in the bag from the Budget Town Food Market?

A I believe we divided the money equally between us.
Q How much was in the bag in cash?
A Something like eight hundred dollars.
Q Was there anything besides cash in the bag?
A I believe there were some checks.
Q What became of the checks?
A I think we tossed them out somewhere along the way.
Q How much was your share for this job?
A I believe it was an equal share, four hundred dollars.
Q Mr. Schales, how old are you?
A 23.
Q At the time of the robbery how old were you?
A 22.
Q I'd like to show you the hat that's marked as Exhibit 2 for identification. Do you recognize that?
A I think it's Mr. Stoner's hat.
[fol. 60] Q You ever seen a hat similar to this before?
A Yes.
Q What was Mr. Stoner wearing on the evening of the robbery?
A I don't remember exactly off hand; that hat and the glasses, yes.
Q You're referring to the glasses that have been marked here as Exhibit 3 for identification?
A Yes.
Q Does this appear to be the glasses that he was wearing on that evening.
A Yes.
Q Do you know what else Mr. Stoner was wearing?
A I believe he had on a brown sport coat.
Q Your recollection is that it was a brown sport coat?
A Yes.
Q I show you then People's 4 for identification, which appears to be a gray—
A That is not the coat he was wearing.
Q Did you make a confession in this case?
A Yes, I did.
Q Were you prosecuted in this case?

A No.

Q Did you enter a plea of guilty at some time?

A Yes, I did.

[fol. 61] Q Did you plead guilty to the armed robbery of the Budget Town Food Market?

A Yes, I did.

MR. TAYLOR: I have no further questions.

THE COURT: You may cross examine.

CROSS EXAMINATION

BY MR. DUNCAN:

Q Sir, before you—

MR. TAYLOR: I wonder—before he starts, I did have another question.

THE COURT: All right, go ahead.

Q BY MR. TAYLOR: Do you know whether or not the gun that Mr. Stoner had was loaded or not?

A I don't believe so. I had no idea.

MR. TAYLOR: Nothing further.

THE COURT: Cross examine, Mr. Duncan.

Q BY MR. DUNCAN: Well, before you entered that plea of guilty, you were told, were you not, that if you would plead guilty and if you would testify against Mr. Stoner, if that became necessary, that they, the District Attorney's Office and the police, would put in a strong recommendation that you be given a county jail sentence?

MR. TAYLOR: Your Honor, it seems to me that is quite a large question and compound. I would object to [fol. 62] it on that ground.

THE COURT: The objection will be sustained. Break it down, Mr. Duncan.

MR. DUNCAN: All right.

Q BY MR. DUNCAN: Before you entered a plea, you had a conversation with the Deputy District Attorney, did you not, over in Pasadena?

A No, I am afraid I didn't.

Q Well, did you have a conversation with any Deputy District Attorney before entering your plea?

A Not that I can remember.

Q All right. You were represented by counsel at that time, were you?

A Yes.

Q And he had some conversation with the District Attorney that he told you about, didn't he?

A No.

Q Well, didn't he tell you that if you entered a plea and you wouldn't testify here, that you would be granted leniency?

A When I spoke to my lawyer, I don't recall his name off hand now, but he asked me if I was guilty and I told him I was; and he asked me if I thought I was doing the right thing by pleading guilty, and I said yes. And he asked me if I knew the consequences, and I said yes.

[fol. 63] Q Sir, just one moment. I wonder if you would just answer my question.

THE COURT: The question was, Mr. Witness: "Were you told that you would be given any leniency"?

THE WITNESS: No, I wasn't told I would be given any leniency.

Q BY MR. DUNCAN: Well, were you told that you might hope for some leniency? Was there any conversation whatsoever that you had that if you did cop out, that you would be granted some type of leniency?

A As far as conversations, there wasn't any promises as far as leniency goes, on my sentence.

Q Well, when did you first relate this story to the police?

A The day we arrived in California.

Q What day was that?

A I believe it was the 16th or 17th of November.

Q All right. Now, then, did the police tell you that if you would cop out, that is, confess, that they would see to it that you got probation or something of that nature?

A What they spoke to me about was they said they couldn't promise me anything; and they said the fact that I was going to plead guilty, it was going to be my own decision.

Q But didn't they say that they would recommend

[fol. 64] that you would get probation?

A I don't know about recommending, but I—I know I had asked them about it. I had asked them about it, but they said they couldn't promise me anything.

Q Well, they did say that their word did carry some weight with the Judge, didn't they?

A Not at the time it wasn't said, no.

Q Well, it was said later, is that it?

MR. TAYLOR: Well, I object. If it happened at a later time, it would be immaterial.

THE COURT: Objection sustained.

THE WITNESS: That their word carried—

THE COURT: The objection has been sustained.

Q BY MR. DUNCAN: Well, after you copped out, you confessed, but prior to entering your plea of guilty, was any statement made to you by any investigating officer, anyone connected with this case for that matter, that the officers' word carried some weight?

MR. TAYLOR: Your Honor, I don't know the materiality of it in that it doesn't go to his testimony here today as to whether or not he's been influenced by what he said about Mr. Stoner.

THE COURT: It's too all-embracing, Mr. Duncan. Break the question down.

MR. DUNCAN: All right.

Q BY MR. DUNCAN: Before you entered your plea, did you have any conversation with anyone in re-
[fol. 65] gard to testifying against Mr. Stoner, if you recall, to do so?

A No, I can't remember that I had any conversation about testifying.

Q Sir, you were granted probation, weren't you?

A Yes.

MR. TAYLOR: That would be immaterial, your Honor. I will object.

THE COURT: Objection is sustained.

MR. TAYLOR: May the answer be stricken?

THE COURT: Yes, it is ordered stricken. The jury is instructed to disregard it.

Q BY MR. DUNCAN: Well, sir, before you pled guilty and before you confessed, didn't the police tell you

that things would go easier on you, or words to that effect, if you did confess?

MR. TAYLOR: Well, I don't know about the confession, whether this is a material point.

THE COURT: The objection will be sustained.

Q. BY MR. DUNCAN: Well, isn't it a fact that they told you that the punishment for robbery was five years to life?

MR. TAYLOR: It is not material to the inquiry, your Honor, as to whether or not he is giving false testimony against Mr. Stoner.

THE COURT: Objection sustained.

[fol. 66] MR. DUNCAN: I am offering this for impeachment purposes.

THE COURT: The objection has been ruled upon.

Q BY MR. DUNCAN: Well, isn't it a fact that you were given a county jail sentence and that the police so promised it?

MR. TAYLOR: It is immaterial as to what happened at a later time.

THE COURT: The objection is sustained.

Q BY MR. DUNCAN: Well, didn't the police at some time promise you, prior to you entering your plea, that if you would enter the plea and if you would testify against Mr. Stoner, or if you would cooperate, any of those terms, that you would not be sent to prison?

A There were no promises made.

Q Of any type whatsoever?

A No. There were no promises made.

Q Well, you were in fact placed on probation, weren't you?

MR. TAYLOR: Same objection.

THE COURT: Objection is sustained. You have asked that three or four times and the objection has been sustained each time, Mr. Duncan.

Q BY MR. DUNCAN: Well, isn't it a fact the reason you're so testifying is because you feel that if you would testify any different from what you told the [fol. 67] police that your probation would be revoked?

A Mr. Duncan, I'm not serving time.

Q Yes or no.

A No.

Q Well, you have a girl friend by the name of Pauline Sanchez?

A She's a friend, yes.

Q She has a brother too, hasn't she?

A No, not that I know of.

Q Well, does she have a friend by the name of Pete?

A Who?

Q This Sanchex girl?

A Does she have a friend by the name of Pete?

Q That's correct.

A Not that I know of.

Q Well, isn't it a fact that you went there with this friend, brother of the Sanchez woman, and committed this robbery?

A No.

MR. TAYLOR: This is an ambiguous question, your Honor.

THE COURT: No, I don't think its ambiguous. Objection will be overruled.

Q BY MR. DUNCAN: What is your answer?

A No.

[fol. 68] Q You recall the day of the week that this robbery took place? On a Tuesday, wasn't it?

A I'm not sure. It could have been.

Q Tell me this: That night you say you were—Were you driving the car or was it Stoner driving the car?

A Is this before or after the robbery?

Q This is after.

A Both of us were driving the car. First I drove, and then Mr. Stoner drove.

Q All right. When you first left the scene of the robbery, who was driving?

A I was.

Q Then when did Stoner start driving?

A I'd say around 20 minutes later.

Q All right. Now, after he let you off, did you go back to the place he was staying that night?

A No, I didn't.

Q Isn't it a fact that about 10 o'clock, 10:30—by

the way, this is a motel, isn't it, that Stoner was staying at?

A No, it's a hotel.

Q And they have a manager there where you leave the key, don't they?

A Yes, there's a clerk at the desk.

Q Now, that Tuesday night, about 10:30 or so, didn't [fol. 69] you go to that clerk and ask for the key of Mr. Stoner's room?

A No, I didn't.

Q Now, this robbery took place about eight o'clock at night, didn't it?

A I don't know exactly what time it took place.

Q Well, was it dark?

A Yes, I believe it was.

Q And was it about—did you go to Stoner's room about an hour and a half or so, maybe two hours, to his room before this robbery took place?

A I can't remember, to tell you the truth.

Q Well, did you ask the clerk for the key to his room any time on the 25th?

A No, I can't remember asking the clerk for the key.

Q You might have?

A No, I can't remember at all.

Q Isn't it a fact that that gun is yours?

A No, it is not.

Q Or you left it in Mr. Stoner's room, didn't you?

A No, I didn't.

Q Ever see that gun in his room?

A Yes, I did.

Q When was that?

[fol. 70] A It was the first time I saw it, a few days before the robbery.

Q Now, did the police, before you plead guilty, did they ever tell you things would go rough on you if you didn't plead guilty?

MR. TAYLOR: Well, I don't think the inquiry as to his plea of guilty is material here; it's whether or not the testimony he gave is influenced. I will object as being immaterial.

THE COURT: Objection will be sustained.

Q BY MR. DUNCAN: Well, before you confessed and before you involved Mr. Stoner, did the police tell you that things would go rough on you if you didn't involve Mr. Stoner?

A No, they didn't say this.

Q Did they ever say that things would go rough on you if you didn't plead guilty?

A No.

MR. DUNCAN: I have no further questions.

MR. TAYLOR: Just one question.

REDIRECT EXAMINATION

BY MR. TAYLOR:

Q Are you now in custody?

A Yes.

MR. TAYLOR: Nothing further.

[fol. 71] THE COURT: That's all, Mr. Schales.

MR. DUNCAN: Just one other question.

RECROSS EXAMINATION

BY MR. DUNCAN:

Q When was the last time you saw Mr. Stoner in court?

A In court?

Q Yes.

A It was yesterday.

Q Well, was there a time before yesterday that you saw Mr. Stoner—about a month ago do you recall an incident where you were going from Department 110 to I believe it was Department 112, and you told Mr. Stoner that "If I don't involve you in this, if I don't testify, things are going to go rough for me."

A Yes, I made the statement to Mr. Stoner; but can I explain the reason why?

THE COURT: Yes.

THE WITNESS: I don't particularly like what I'm doing. I'm trying to tell the truth. May make me appear as a small man, but I'm trying to tell the truth. I'm

trying to do what is right. And that's what I meant when I told him that.

THE DEFENDANT: That is a lie and you know it.

THE COURT: You be quiet, Mr. Stoner.

[fol. 72] Q BY MR. DUNCAN: So there won't be any room for any mistake, it is your testimony that before you involved Mr. Stoner, that there was not one word from any law-enforcement official—that would include any police officer, any investigating officer, any representative from the District Attorney's Office—not one word that if you involved Mr. Stoner, that if you copped out, as it were, that leniency would be granted to you or any favor would be granted to you?

A Can I—it's rather a big question you're asking.

MR. TAYLOR: I will object.

Q BY MR. DUNCAN: Just yes or no.

A The way you phrase your question it takes in so much.

Q Well, you see, I don't know the exact words that they used—

THE COURT: Wait a minute, Mr. Duncan. That's a compound and complex question. The Court directs you to reframe it.

Q BY MR. DUNCAN: Before you told your story involving Mr. Stoner, did you ever receive or did you ever hear any statement by any law-enforcement officer, including any person from the District Attorney's Office, that you would be accorded or you might expect some leniency in this matter?

[fol. 73] A Before I involved Mr. Stoner?

Q Yes.

A No, not before I involved Mr. Stoner, no.

Q Well, before you testified here today, did you?

A As far as any matters of leniency goes, to my sentence or my probation, this was definitely stated by both officers, police officers, that there could not be any promises made. And as far as leniency goes, it wasn't up to them, it was up to the Judge.

Q Yes, but they told you they'd put in recommendations, didn't they?

A They told me they could put in recommendations, is that your question?

Q Did they mention anything about that they put in recommendations or they spoke to probation officers or probations officers spoke to them?

A No, there was nothing mentioned about probation officers.

Q Well, did they say that they did put in recommendations?

A If I remember correctly as far as the recommendation goes, I think Judge Noble himself—

MR. TAYLOR: I don't think this is responsive to the question. I will object.

THE COURT: The objection is sustained.

[fol. 74] Q BY MR. DUNCAN: Well, it is a fact that there was a recommendation from the police officers, isn't that true?

MR. TAYLOR: Would be immaterial, your Honor.

THE COURT: The objection is sustained.

Q BY MR. DUNCAN: Did the police say anything prior to you involving Mr. Stoner, about any recommendations?

A No, there was nothing said about recommendations.

Q What did they say prior to you confessing and involving Mr. Stoner? What did they say to you?

A Well, actually told me it was my decision to make, as far as pleading guilty or not guilty.

Q Did they give you any reason why it would be better if you did plead guilty, other than it was good for the soul, or other words to that effect?

MR. TAYLOR: Again, your Honor, we are returning to this plea of guilty. I don't think that's material.

MR. DUNCAN: No, that was not my question. I'll withdraw the question and reframe it.

THE COURT: All right.

Q BY MR. DUNCAN: Prior to you giving this statement or confession to the police, wherein you involved Mr. Stoner, did they give you any reasons why it would be better for you to confess or it might go easier for you or anything to that effect.

A No, they left the decision up to me, as far as—
[fol. 75] Q I know that, sir; you told us that before. But I wonder if you would answer the question.

A Would you repeat your question, please?

(Whereupon the last question was read by the reporter.)

A No.

Q Well, you mentioned before that there was nothing said about punishment or how things might go easier for you prior to your making this confession. Were there any other statements made where you might—that certain favors would be granted to you if you did confess?

MR. TAYLOR: I think it's a compound question. I got lost in it myself.

THE COURT: It has been asked and answered several times, I think, Mr. Duncan.

MR. DUNCAN: Your Honor, I believe my other questions went to the matter of leniency and as far as punishment is concerned. My question now is including things other than punishment, some other favor that might have been promised.

THE COURT: The objection has been ruled on, Mr. Duncan.

MR. DUNCAN: I wonder if we might approach the bench, your Honor, on another matter that I asked a question on, and there's been a ruling. I desire to make [fol. 76] an offer of proof.

THE COURT: All right.

(Whereupon the following proceedings were had at the bench, outside the hearing of the jury:)

MR. DUNCAN: This witness has testified that he has not been—was never given any promise at any time. I wish to offer proof—I desire to elicit evidence that in fact—and this is by way of impeachment—that in fact he was granted leniency, that a recommendation did come from the District Attorney's Office and the investigating officers that this man not be sent to prison and that Judge Noble even went so far as to make the statement

that in all his years on the bench he had never failed to cite a man in a case of armed robbery, to the penitentiary but, because of the strong recommendation he had received from the District Attorney's Office and the investigating officers, he was in this case going to grant probation; that in fact probation was granted and county jail sentence imposed rather than state prison sentence.

MR. TAYLOR: My only position on this, your Honor, is that unless the inducement goes to his testifying here in court, it woud be immaterial.

MR. DUNCAN: I will frame my questions so that they do include that.

THE COURT: Well, if you are in a position to prove what you say, you will be allowed to do it; but you will have to do it within the rules.

[fol. 77] MR. TAYLOR: Can we have an offer of proof that includes how you intend to prove this?

MR. DUNCAN: Now this is a matter—this is—now he's testified to the contrary. Now this is my impeachment. I'm saying in fact a recommendation—he says there's no promise of a recommendation. I'm offering proof that in fact there was a recommendation and that Judge Noble so stated in open court that there was a recommendation and probation was in fact granted.

THE COURT: How are you going to prove that?

MR. DUNCAN: Just by asking him. He knows probation was granted.

THE COURT: I know, but you can't prove what you have referred to as a recommendation by his testimony.

MR. DUNCAN: Well, I suppose I can subpoena Judge Noble out here.

THE COURT: I am not going to suggest how you do it, Mr. Duncan, but after all you have got to prove it by competent testimony.

MR. DUNCAN: All right, I will get Judge Noble out here. I will subpoena him this afternoon. All right. And what about the—Now, I still feel I should be able to elicit evidence that he was granted probation.

THE COURT: I will permit you to do that.

[fol. 78] (Whereupon the following proceedings were had in open court, within the hearing of the jury:)

Q BY MR. DUNCAN: Sir, in this matter you were, were you not, granted a straight one year county jail sentence?

A Yes.

MR. DUNCAN: I have no further questions.

REDIRECT EXAMINATION

BY MR. TAYLOR:

Q Relative to your state of mind when you were going from Department 110 to I think it was 112, and you made the statement to Mr. Stoner, what was your state of mind at that time? Were you in fear or what?

A No, I was just rather upset, the fact that—like I said, I didn't particularly like testifying, but I wanted to tell the truth.

Q Are you telling the truth here today?

A Yes, I am.

Q How much of your term do you have left to go in jail?

A About six months.

MR. TAYLOR: I have nothing further.

THE COURT: That's all, Mr. Schales. Step down. You may call your next witness.

MR. TAYLOR: I thought Mr. Duncan was going to [fol. 79] recall Mr. Greely.

THE COURT: Is Mr. Greely available now? See if Mr. Greely is out in the hall, Mr. Bailiff.

Just come up here, Mr. Greely. You have been sworn. You are still under oath.

This is for further cross examination, Mr. Duncan?

MR. DUNCAN: Yes, your Honor.

THE COURT: So that the witness may get back to his business.

MR. DUNCAN: Yes.

DAVID GREELY,

recalled as a witness in behalf of the People, having been previously duly sworn, testified further as follows:

FURTHER CROSS EXAMINATION

BY MR. DUNCAN:

Q Sir, this man you say is Stoner, came in and took this money from you, you say he was wearing a gray hat?

A Yes, sir.

Q And is this the hat (indicating)?

A It resembles the hat.

Q Can you tell us for sure if this was the hat or not?

A No.

Q All right. Now, could you tell us how the brim [fol. 80] was? Was it up like this, or was is snapped down, or in what manner?

A I believe it was snapped down.

MR. DUNCAN: And I wonder, Mr. Stoner, if you would come up here and put this hat on for us. Now step up, Mr. Stoner.

Q BY MR. DUNCAN: Now, will you direct Mr. Stoner how the brim of the hat was?

A More or less like that. (Indicating).

MR. DUNCAN: Mr. Stoner, would you put on these glasses.

Q BY MR. DUNCAN: Do those look like the glasses?

A He was wearing them up higher. The look like the glasses. They resemble them.

THE COURT: All right, take them off. Resume your seat.

MR. DUNCAN: Yes. I wonder if you would face the jury, Mr. Stoner, with your glasses on like that. Just face the jury. All right, you may take them off and resume your seat.

Q BY MR. DUNCAN: Now, when you saw Mr. Stoner there before you, you could see his eyebrows, couldn't you?

A Yes.

THE COURT: You mean now or then?

Q BY MR. DUNCAN: Now.

[fol. 81] A Now I can see them.

Q But when this holdup took place, you couldn't see his eyebrows?

A I don't remember seeing them. They didn't stand out particularly, that I know of.

Q You testified here yesterday, did you not, that you did not see his eyebrows?

A As far as I know I didn't see his eyebrows.

Q Now, you recall testifying at the preliminary hearing?

A I recall testifying, yes.

Q Now directing your attention to page 9 of your testimony at that hearing, starting at line 8 and going to line 15, will you read that to yourself?

A 8 through 15?

Q That's correct.

(Whereupon the witness is handed the transcript.)

Q In response to these questions, did you not give these answers:

"Q Did you see his eyes?

"A No, I couldn't see your eyes, I couldn't notice that."

MR. TAYLOR: I am going to object to that. It was not accurately stated.

THE COURT: I can't hear you, Mr. Taylor.

MR. TAYLOR: I don't believe he's accurately reading the transcript. This was a question at the prelim-

[fol. 82] inary hearing by Mr. Stoner:

"Q Did you see my eyes?"

MR. DUNCAN: I had the "my" crossed out, and it may well be that that was his testimony.

"Q Did you see my eyes?

"A No, I couldn't see your eyes, I couldn't notice that.

"Q You could not notice that?

"A You had a gray hat on so I did not see the color of your eyes or the color of your hair. I guess the hat must have covered up your eyebrows."

Was that your testimony at the preliminary hearing?

A If that's recorded, it must be.

Q Now, directing your attention to page 8 of that same transcript, at the same hearing, lines 20 through 26. Would you read that to yourself?

(Whereupon the transcript was handed to the witness).

Q BY MR. DUNCAN: "Q Just tell me"—

MR. TAYLOR: Before he asks this, your Honor, I would suggest that I don't feel it's any different than the testimony he has given.

THE COURT: Let me see the transcript, Mr. Duncan.

MR. DUNCAN: Surely.

THE COURT: What line?

MR. DUNCAN: Line 20 through 26.

[fol. 83] THE COURT: How far do you propose to go?

MR. DUNCAN: All the way to the bottom. In fact the bottom line is what I'm getting at.

THE COURT: What is your objection again?

MR. TAYLOR: It is not impeaching, your Honor.

THE COURT: The objection is sustained.

MR. DUNCAN: May I make an offer of proof?

THE COURT: No, your offer is in the record.

MR. DUNCAN: Well, the record does not contain a record of what took place at the preliminary hearing.

THE COURT: It's available.

MR. DUNCAN: I wonder if it might not be stated for the record now?

THE COURT: No, it isn't necessary, Mr. Duncan.

Q BY MR. DUNCAN: When did you first see the likeness of Mr. Stoner after this robbery?

A I would say when we drew the composite.

Q Drew a picture, did you?

A We didn't draw it, no. You are asked to make a picture with a man who helps you draw it. You just give the necessary details and he draws a picture until you get the likeness of what you want to see.

Q All right. And this was done, is that right?

A That's right.

Q Is this some type of artist?

A No.

[fol. 84] Q How was this done? I mean did someone draw?

A No, nobody draws at all.

Q How is it done?

A A man has a file and they have—they have thousands of eyebrows and then they just keep marking it up until you make up what you want.

Q And at some stage you said that this looked like the man?

A You say what you want to see.

Q At some stage you said "This looks like the man"?

A That's right.

Q And about how long was that after this robbery?

A I don't recall. Shortly.

Q Within a week?

A Less than a week.

Q All right. Then after that, what was the next time you saw a likeness? Was that when you saw—

A They showed a picture and I said I would like to see it.

Q Wasn't sure when you saw the picture?

A I was quite sure, but I wanted to see.

Q And then you later saw him in some type of line-up?

A Yes, sir.

Q And there were two other people in the line-up?

A As far as I can recall there was two other people. [fol. 85] I don't—I don't believe another one came in, because I said "That's the man" as he walked in.

Q Now, by the way, before you went up there, did they tell you that they had the man you had seen in the photograph?

A I didn't even see the police officer. I was called and my boss told me to go over.

Q And there was no conversation before you identified him?

A No.

MR. DUNCAN: I have no further questions.

THE COURT: Are you through with Mr. Greely now?

MR. TAYLOR: I have two questions.

THE COURT: All right.

REDIRECT EXAMINATION

BY MR. TAYLOR:

Q The question that Mr. Duncan read to you "Did you see my eyes?" Did Mr. Stoner himself ask that question of you at the preliminary hearing?

MR. DUNCAN: I am going to object. Completely irrelevant.

THE COURT: Objection sustained.

MR. TAYLOR: I have, your Honor, a photograph of a composite; looks like the face of a man. May this be marked as People's 5?

[fol. 86] THE COURT: Have you seen it, Mr. Duncan?

MR. DUNCAN: No, I have not. I'm quite interested in seeing it.

THE COURT: No. 5 for identification.

Q BY MR. TAYLOR: Showing you People's 5 for identification, do you recognize that?

A Yes, sir, I do.

Q Is that the composite that you helped make up with the Sheriff's office?

A Yes, it is.

MR. TAYLOR: Nothing further.

THE COURT: You are through with Mr. Greely now, are you?

MR. DUNCAN: I am.

MR. TAYLOR: I am.

THE COURT: All right, you may return to your business, Mr. Greely.

* * * * *

[fol. 87] You may call your next witness.

MR. TAYLOR: Thank you, your Honor. The next witness will be Officer Gilliland.

CHARLES M. GILLILAND,

called as a witness in behalf of the People, being first duly sworn, testified as follows:

THE CLERK: State your name, please.

THE WITNESS: Charles M. Gilliland.

DIRECT EXAMINATION

BY MR. TAYLOR:

Q Mr. Gilliland, what is your business of occupation?

A Police officer for the City of Monrovia.

Q Are you a Detective there?

A Yes, sir.

Q Did you participate in the investigation of this robbery?

A Yes, sir.

Q Showing you People's Exhibit 1 for identification, have you ever seen this gun?

A Yes, sir.

Q When was the first time you saw that gun?

MR. DUNCAN: Your Honor, I am going to at this time move for permission to examine this witness on [fol. 88] voir dire out of the presence of the jury.

THE COURT: Well, I don't—

MR. DUNCAN: Going into a sphere I believe that—

THE COURT: You may have something in mind that I don't know anything about. The motion will be denied at this time.

The question was: "When was the first time you saw that gun?"

MR. TAYLOR: I think he's trying to raise a search and seizure question.

THE COURT: Well, don't try to anticipate anybody, Mr. Taylor. You go ahead.

MR. TAYLOR: Fine.

Q BY MR. TAYLOR: Tell us the date and time that you saw this gun, People's 1 for the first time?

A Well, it was on the evening of the 27th of October, approximately 11 P.M.

Q 1960?

A 1960.

Q At what location?

A That's at the Mayfair Hotel in Pomona.

Q Where, in the Mayfair Hotel?

MR. DUNCAN: Your Honor, at this time I do desire to go into the matter of search and seizure outside the presence of the jury.

[fol. 89] THE COURT: All right. Ladies and gentlemen, Counsel has indicated that he wants to go into matters with which you are not concerned. You may be excused to go upstairs to the jury room. Remember not to discuss this matter among yourselves or with others, or to form or express any opinion until it is submitted to you.

You may go upstairs to the jury room.

Whereupon the jury left the courtroom and the following proceedings were had outside the presence of the jury:)

THE COURT: Go ahead, Mr. Duncan. The jury has retired.

VOIR DIRE EXAMINATION

BY MR. DUNCAN:

Q Now, did you have a warrant for the arrest of the defendant?

A No, sir.

Q Did you have a search warrant for the premises?

A No, sir.

MR. DUNCAN: I have nothing further.

THE COURT: Is that all you have on the subject?

MR. DUNCAN: It's not up to me, it's my understanding.

THE COURT: Well, there's nothing before the Court. I will have to call the jury back downstairs.

Q BY MR. DUNCAN: Well, I take it that subsequently you did then find this weapon, did you, in some hotel room?

[fol. 90] A Yes, sir.

Q And whose hotel room was it?

A Room 404, registered to Joseph L. Stoner.

Q And whereabouts in the room did you find it?

A It was on the floor, under the bottom drawer of a bureau in that room 404.

Q And this was before you had had any conversation whatsoever with the defendant, isn't that right?

A That's correct.

MR. DUNCAN: Your Honor, I will object to any

testimony in regard to the finding of this weapon on the ground it is an illegal search and seizure.

THE COURT: Do you want to lay your foundation?

MR. TAYLOR: Yes, your Honor.

EXAMINATION

BY MR. TAYLOR:

Q Mr. Gilliland, I think you did tell us that you recovered People's Exhibit 1 in the Mayfair Hotel in the City of Pomona?

A Yes, sir.

Q What sort of hotel is that? How many rooms in it?

A I don't know the exact number of rooms, but I presume there's probably better than a hundred and fifty.

Q Is it a transient type hotel, or is it a more per-
[fol. 91] manent type?

MR. DUNCAN: I am going to object to that as a conclusion of the witness.

THE COURT: Objection will be overruled.

THE WITNESS: It's a transient type of hotel.

Q BY MR. TAYLOR: Prior to going to that hotel in Pomona on October 27th of 1960, had you conducted some sort of investigation about the robbery that occurred at the Budget Town Food Market?

A Yes, sir.

Q Had you retrieved any evidence?

A Yes, sir.

Q Tell us how you conducted your investigation that led up to the search of the hotel room?

A Well, during the investigation a portion of the evidence that was retrieved at the scene was a check book.

MR. TAYLOR: Your Honor, I have what appears to be a check book. May this be marked People's next in order?

THE COURT: People's Exhibit 6.

Q BY MR. TAYLOR: Showing you People's Exhibit 6 for identification, do you recognize that?

A Yes, sir.

Q Is this the check book that you mentioned that turned up in the course of your investigation?

A Yes, sir.

[fol. 92] Q Who presented you with this Exhibit 6?

A The manager of the store.

Q Which store is that?

A The Budget Town Market where the robbery occurred.

Q What did the manager of the store tell you?

A Stated that this had been dropped near the scene; and he turned it over to me as possible evidence.

Q Was this shortly after the robbery had occurred?

A Shortly after the robbery had occurred.

Q Did he tell you where specifically that check book had been found and by whom it had been found?

A He stated that it had been found on the parking lot just to the rear of the store, by Mrs. Franklin.

Q Did he tell you when the check book had been recovered?

A Shortly after the robbery.

Q Did you investigate this check book?

A Yes, sir.

Q What did you do?

A I checked the number in the book, the account number; then I called the Pomona branch of the Bank of America, asked for their personnel man, asked him if he would give me the information regarding the owner of this particular check book. He advised me that this book was registered to a Joey L. Stoner.

[fol. 93] Q What is that again? Would you spell that first name?

A Joey, J-o-e-y. Joey L. Stoner. And he gave the address as being in Ontario, California.

Q Is that the extent of the investigation that you did relative to the check book?

A This is not the extent, no. The name also appears in the deposit book.

Q This is part of the exhibit, is it?

A This is part of the exhibit.

Q What name appears there?

A The name that appears at the top of the deposit book is Joey L. Stoner, and also on the deposit side the Pomona number 210, and two deposits.

Q Aside from talking to the store manager about this check book and the officer at the Pomona Branch of the Bank of America, what else did you do?

A Well, during the checking of the check book relating still to the check book, it was noticed that a check was made out on the check stub to the Mayfair Hotel. In fact there was two of them; one on October 21st, 1960, and one on October 22nd, 1960.

Q Was there any indication as to what the check was made in payment of?

A On the bottom it says "For rent", on the first one which is check numbered—Stub No. 3. On check stub [vol. 94] No. 4, October 22, 1960, the Mayfair Hotel "For Spree".

Q For what?

A Spree, S-p-r-e-e.

Q Tell us about the investigation that you conducted now leading up to the search of the room at the Mayfair Hotel?

A At this time I went directly to Pomona Police Department and checked to see if there was a record on a name Joey L. Stoner. I found that there was.

Q What was that record?

A The record indicated that Joey L. Stoner had a record of robbery and murder of which he was convicted in years past, which he had served time for. And there were several other entries on the record, which I don't recall at this time.

Q Did you get anything else at the Pomona Police Deparment?

A At that time I obtained from the record of the Pomona Police Department a photograph.

MR. TAYLOR: Your Honor, I have a photograph of a person, it shows a sideview and front view labeled "Pomona Police Department". May this be marked People's 7 for identification?

THE COURT: It will be so marked.

Q BY MR. TAYLOR: Showing you People's 7 for identification, do you recognize that?

[fol. 95] A Yes, sir.

Q Is that the mug shot you got from the Pomona Police Department?

A Yes, sir.

Q Now, what else did you do?

A I then took this particular mug shot, took it back to the Budget Town Market in Monrovia, showed it to a David Greely and Donna, the other victim in this particular robbery. They both stated that this looked like the man who held the gun, however, they would like to see him in person.

Q What else happened?

A I continued certain investigation on it to determine the record, certain record checks, to complete that portion of the record check investigation, and then approximately 10 o'clock that night the—

Q What night is this now?

A The 27th of October, 1960. Mr. Collins and myself proceeded to Pomona. We made contact with the Pomona Police Department, two detectives, Detective Oliver and Rowland, and discussed the Mayfair Hotel for a short time, and then they stated that they would go with us to the Mayfair Hotel since we were not too familiar with it. And two different police cars went to the Mayfair Hotel, parked on the City parking lot directly east of the hotel, went into the lobby, the four of us. We approached the desk, the night clerk, and asked him if [fol. 96] there was a party by the name of Joey L. Stoner living at the hotel. He checked his records and stated "Yes, there is." And we asked him what room he was in. He stated he was in Room 404 but he was out at this time.

We asked him how he knew that he was out. He stated that the hotel regulations required that the key to the room would be placed in the mail box each time they left the hotel. The key was in the mail box, that he therefore knew he was out of the room.

We asked him if he would give us permission to enter the room, explaining our reasons for this.

Q What reasons did you explain to the clerk?

A We explained that we were there to make an arrest of a man who had possibly committed a robbery in the City of Monrovia, and that we were concerned about the fact that he had a weapon. He stated "In this case, I will be more than happy to give you permission and I will take you directly to the room."

Q Is that what the clerk told you?

A Yes, sir.

Q What else happened?

A We left one detective in the lobby, and Detective Oliver, Officer Collins, and myself, along with the night clerk, got on the elevator and proceeded to the fourth floor, and went to Room 404. The night clerk placed a [fol. 97] key in the lock, unlocked the door, and says, "Be my guest."

Q What did you do?

A We entered the room, and the first thing that was observed was a pair of horn-rimmed glasses laying on a desk in the northeast corner of the room. I picked the glasses up and looked at them and noted that they answered the description of the glasses described by one of the victims.

Q I'm going to show you the exhibit that's marked here as People's Exhibit 3 for identification.

A Yes, sir, that's the glasses.

Q Are these the glasses that you observed in the room?

A Yes, sir.

Q Did you attach any significance to the fact that these glasses—the fact of these glasses being in the room?

A Well, the fact that they were horn-rimmed glasses.

Q Had you received some sort of report from some person about horn-rimmed glasses?

A Yes, one of the victims in the robbery had stated that the suspect who had the gun in his hand also wore horn-rimmed glasses.

Q What else did you do?

[fol. 98] A Then began a systematic search of the room and noted that certain clothing in the room was along the same description as given by the victim or the victims; and during the check of the bureau, Officer Col-

lins pulled the drawers from the bureau to check them. The bottom drawer, when he pulled it completely out we observed a gun lying on the floor, which is the gun which is now—

Q Is that People's Exhibit 1?

A People's Exhibit 1, I believe. And alongside of this gun was a—some toilet paper, white toilet paper which we unwrapped and it showed a number of cartridges for a .45 automatic.

MR. TAYLOR: Your Honor, I have an envelope full of cartridges. May this be marked as People's 1-A for identification?

THE COURT: Now, let's keep it in order. People's Exhibit No. 8.

MR. TAYLOR: 8?

THE COURT: Yes.

Q BY MR. TAYLOR: Showing you People Exhibit 8 for identification, do you recognize that?

A Well, I—I would say that it is the same shells, however I did not mark the shells. I do not know.

Q Where they marked in your presence?

A I did not see them marked, no, sir.

Q What about the continuity of the evidence? Did [fol. 99] you keep them after this search of the hotel room?

A They were kept by Officer Collins, my partner.

Q Was there anything else discovered in the room?

A There was certain address books and other miscellaneous evidence that was obtained, yes.

MR. TAYLOR: Your Honor, I have what appears to be a clip to a .45 pistol. May this be marked as People's 9?

THE COURT: It will be so marked.

MR. TAYLOR: For identification.

Q BY MR. TAYLOR: Showing you People's 9 for identification, do you recognize that?

A Sir, I can't say for sure that that is the same clip, because I did not mark it, nor did I see it marked at that time.

Q When you first observed the gun in the room, did it have a clip in it?

A Yes, the clip was in the butt of the gun.

Q Now, with reference to the hat, People's 2—no, withdraw that—the coat, People's 4 for identification; did you recover that from the room?

A It was taken from the room, yes.

Q What else occurred after the search?

A Well, at this time we determined that this would be the suspect in our particular robbery and we maintained an observation of the room or in the room, my [fol. 100] partner and myself, until approximately noon the following day, which was the 28th of October.

Q When had you made your entry to the apartment —to the hotel room, excuse me?

A Into the room, would be approximately 11 o'clock.

Q That would be in the evening of October 27th?

A October 27th.

Q And you stayed there until noon the following day, October 28th?

A Yes, sir.

Q Did anybody arrive during that time?

A Nobody except other detectives or—would be only the other detectives.

MR. TAYLOR: I have no further questions.

THE COURT: Any examination on that?

MR. DUNCAN: Just one question, I believe.

EXAMINATION

BY MR. DUNCAN:

Q I believe you said that the manager told you that shortly after this robbery this check book was found, is that right?

A Yes, sir.

Q Did you ask him what he meant by that, if he meant the next morning or what he meant?

[fol. 101] A I don't believe I asked him that question, sir.

Q When you checked the record, you found out, did you not, that this robbery that Mr. Stoner had been convicted of had occurred some 17 or 18 years ago, didn't you?

A I don't remember the exact date. I believe it was 1941.

MR. DUNCAN: I have no further questions.

THE COURT: Is there anything for the Court to rule upon at this time?

OFFERS IN EVIDENCE

MR. TAYLOR: I would move that People's Exhibit 1 for identification, the gun; People's Exhibit 3 for identification, the glasses; and People's Exhibit 4 for identification, the coat; People's 8 for identification, the cartridges; and People's Exhibit No. 9 for identification, the clip, be received in evidence.

THE COURT: How about No. 2, the hat?

MR. TAYLOR: This was not recovered in the room.

THE COURT: Oh, I see. All right.

MR. DUNCAN: The same objection, your Honor.

THE COURT: There isn't any objection before the Court yet.

MR. DUNCAN: Well, at this time, your Honor, I would object to the introduction of such evidence, on the ground this is an unlawful search and seizure.

[fol. 102] THE COURT: Is the matter submitted?

MR. DUNCAN: Submitted.

MR. TAYLOR: Submitted.

THE COURT: The objection is overruled. They will be received in evidence as marked.

Call the jury down, please.

(Whereupon the following proceedings were had in open court within the presence and hearing of the jury:)

THE COURT: Let the record show the defendant is in court with counsel, the District Attorney is present, the jurors are present and in their places.

Go ahead, Mr. Taylor.

DIRECT EXAMINATION (resumed)

BY MR. TAYLOR:

Q What room of the Mayfair Hotel did you see this gun?

A In Room 404.

Q Was there somebody present at the time you searched Room 404?

A Yes, sir.

Q Who was that?

A Detective Collins and Detective Oliver, of the Pomona Police Department.

Q All right. Where, in Room 404 of the Mayfair Hotel in Pomona, did you recover the gun?

[fol. 103] A Recovered it on the floor under the bottom drawer of the bureau in the room.

Q Did it have a clip in it at the time?

A Yes, sir.

Q Did that clip appear to be similar to People's Exhibit in evidence No. 9?

A Yes, sir.

Q What else was with the gun, if anything?

A Alongside the gun and wrapped in white toilet paper was .45 cartridges.

Q Inviting your attention to People's Exhibit 8 in evidence, does that appear to be similar to the cartridges that you observed at that time?

A Yes, sir.

Q Was there anything else recovered from the room?

A A jacket.

Q Referring to People's 4 in evidence, is that the jacket?

A Yes, sir. And a pair of glasses, horn-rimmed glasses.

Q Is that the glasses before you that are now People's Exhibit 3 in evidence?

A Yes, sir.

Q Now, when did you enter that room?

A Approximately 11 o'clock, 11 P.M. on the 27th [fol. 104] of October, 1960.

Q And when did you leave the room?

A Approximately 12 noon on the 28th of October, 1960.

Q That would be the following day?

A Yes, sir.

Q During the course of your investigation, Mr. Gilliland, did you have occasion to talk to this defendant, Mr. Stoner, concerning the robbery of the Budget Town Food Market?

A Yes, sir.

Q Was this one conversation, or more than one conversation?

A It was more than one.

Q Did you have occasion to travel some place to locate Mr. Stoner?

A Yes, sir.

Q Where did you travel?

A City of Las Vegas, Nevada.

Q Did you converse with Mr. Stoner there?

A Yes, sir.

Q That would have been conversation No. 1 then?

A Yes, sir.

Q When was the next time that you conversed with Mr. Stoner?

A Had a short conversation with him on the 31st of [fol. 105] October, at the Pomona Police Department.

Q That would be conversation No. 2 then?

A Yes, sir.

Q Did you have a later conversation?

A Yes, sir.

Q When was that?

A That was on the 1st day of November, 1960, at the Temple City Jail.

Q Is this a Sheriff's Office there?

A Sheriff's Office, yes, sir.

Q What time of the day or night was this third conversation at the Temple City Jail?

A That was approximately 10:30 A.M. on the 1st.

Q Who was present at the time of that conversation?

A Officer Collins and myself.

Q Was the defendant present?

A The defendant, yes, sir.

Q Were the statements made at that time, at the Temple City Jail by the defendant, freely and voluntarily given?

A Yes, sir.

Q Had you promised him any reward, immunity, or benefit to cause him to talk to you?

A No, sir.

Q Did you use any force on him or any coercion of any nature to cause him to talk to you?

[fol. 106] A No, sir.

Q Would you tell us now what the defendant told you on November 1st, 1960, at the Temple City Jail?

MR. DUNCAN: Your Honor, at this time I request to take this witness on voir dire and introduce independent evidence on the issue of voluntariness of this statement.

THE COURT: Do you want this in the presence of the jury?

MR. DUNCAN: No, your Honor.

THE COURT: Ladies and gentlemen, you may be excused until 1:45. You will remember your duty not to discuss this matter among yourselves or with anyone else or to form or to express any opinion in the matter until it is submitted to you. When you come back from lunch, go upstairs and we will call you down.

Be back here at 1:45.

(Whereupon the jury left the courtroom and the following proceedings were had outside the presence of the jury:)

THE COURT: Go ahead, Mr. Duncan. The jury has retired.

VOIR DIRE EXAMINATION

BY MR. DUNCAN:

Q Sir, prior to this statement being made, didn't you tell the defendant if he copped out and then later plead [fol. 107] guilty at the time of the preliminary hearing, shorten things up, that you'd see to it that he was just sent back on a violation?

A I did not.

Q Pardon me?

THE COURT: He says "I did not."

Q BY MR. DUNCAN: All right. Did you tell him that if he did make this—By the way, when you had this conversation with the defendant, didn't he tell you that—didn't he ask you why he hadn't been allowed to call up?

A He asked me why he didn't—wasn't allowed to call out?

Q That's right.

A He never said anything to me about it.

Q Well, how long had he been in custody at the time that you picked him up or whoever picked him up in the beginning, until he made this statement?

A He was picked up approximately noon on Saturday, on October 29th in Las Vegas.

THE COURT: And this statement was made when?

THE WITNESS: The statement was made on the first day of November, 1960.

THE COURT: So he had been in custody approximately three day, is that right?

THE WITNESS: Yes, sir.

Q BY MR. DUNCAN: Now, during this time he [fol. 108] had been switched from jail to jail, had he not?

MR. TAYLOR: Well, your Honor, I don't know if he would have firsthand knowledge.

I will withdraw it.

THE COURT: If he hasn't got it, he can say so.

THE WITNESS: Switched from jail to jail?

THE COURT: Yes, moved from jail to jail.

THE WITNESS: He was moved from the Las Vegas jail to the Pomona Police Department. A stop was made at his request to see his parole officer, which was allowed. His parole officer saw him. And he was taken directly from there to Temple City Jail where we booked him in.

THE COURT: And that's where this conversation took place?

THE WITNESS: Yes, sir.

Q BY MR. DUNCAN: Did he ask you if he could see his wife?

A He did not.

Q After he made this statement, did you allow him to see his wife?

A He was allowed to see his wife. I don't recall the exact time of this.

THE COURT: You don't know whether it was before or after he made the statement, is that right?

THE WITNESS: I don't recall it, sir, no, sir.

THE COURT: All right.

[fol. 109] MR. DUNCAN: I have no further questions of this witness.

THE COURT: Do you have any further questions on the subject at all, on the subject of the free and voluntariness?

MR. DUNCAN: I am going to put Mr. Stoner on.

THE COURT: All right. Step down, Mr. Gilliland.

MR. DUNCAN: Mr. Stoner, would you take the stand?

JOSEPH LYLE STONER,

the defendant herein, called as a witness in his own behalf, being first duly sworn, testified as follows:

THE CLERK: State your name, please.

THE WITNESS: Joseph Lyle Stoner.

DIRECT EXAMINATION

BY MR. DUNCAN:

Q Mr. Stoner, do you recall having a conversation with the officer who was just on the stand?

A Yes, sir.

THE COURT: That's Mr. Gilliland, Mr. Stoner.

THE WITNESS: Yes, sir.

Q BY MR. DUNCAN: That was on November 1st?

A Yes, sir.

Q Prior to making that statement, had the officer or any other officer made any statement to you that you would receive any benefit from copping out as it were?

A Yes, sir.

[fol. 110] Q And what was said to you and by whom?

A I'm not sure whether one individual officer or both of them told me that if I would go ahead and plead guilty and name the other man, then go into court and

waive all of my rights, refuse the Public Defender's Officer, that they would—they were—their Chief would talk to the District Attorney who had acted favorably before in requests of this kind, they would see the Chief, have him see the District Attorney in my behalf.

Q And did they say what would happen?

A Yes, sir.

Q What did they say?

A That the charge would be dismissed and I'll go back to prison on a straight parole violation.

Q Was there anything said about you being able to call out to anybody?

A Yes, sir.

Q What was said?

A Again I don't recall which detective it was, but they specifically told my parole officer in Pomona that I wasn't to call anyone, no one was to know where I was at, especially my family.

Q Had you, up to this time, seen your family?

A No, sir.

Q Now, you did make some statement, did you?

A Yes, sir, I did.

[fol. 111] Q After you made this statement—I suppose might be called a confession—were you then allowed to see your wife?

A Immediately, about five minutes later.

Q Do you know what officer was present when she was brought in?

A No, I don't. It was either Mr. Collins or Mr. Gilliland.

Q What was the reason or the motivating factor of why you made this statement to the police?

A I wanted to see my wife at that point.

Q And what about this—anything else?

A Yes, I wasn't sure that on my being out-of-state whether I was violated or not, so I wanted to talk to my wife; if they were going to go ahead with the deal and if I waived all my rights and go back to violation, which I possibly would be going back on anyway.

Q You mean because you were out of state?

A Yes, sir.

Q Was that in violation of the rules on parole, being out of state?

A Occasionally it is if they want to enforce it, yes, sir.

MR. DUNCAN: I have no further questions.

THE COURT: Do you have any questions?

MR. TAYLOR: Yes, your Honor.

[fol. 112] CROSS EXAMINATION

BY MR. TAYLOR:

Q Who was it that told you this first statement about benefit if you plead guilty and named the other and go to court and waive your rights, refuse the P.D., the Chief would talk to the District Attorney? Who said that?

A Alternately both detectives, Mr. Collins and Mr. Gilliland.

Q Were they together at the time they made that promise to you?

A Yes, sir.

Q What location was it?

A I'm not sure. It was—I believe—I believe in Temple City. I was pretty upset at the time. I am not quite sure about that, but I believe Temple City.

Q Did the officers make you any promises in Las Vegas?

A No.

Q On the way from Las Vegas, from Las Vegas to Pomona, did they make any promises?

A No, I can't say that they did.

Q Did they make any promises in Pomona, these officers, Collins and Gilliland?

A No, sir. At that time I was placed in a solitary confinement cell and I don't—I didn't talk to anyone.

[fol. 113] Q From Pomona Police Department to the Temple City Sheriff's Station, did either of these officers make you any promises?

A I really don't remember.

Q It was either then on the way to Temple City or at Temple City that they made the promises?

A At Temple City, yes, sir. I feel sure it was at Temple City.

Q I didn't quite understand about this calling out. Did the officers talk to you about your placing telephone calls?

A Did they talk to me?

Q Yes.

A No, the first word that was said about it—of course, I was concerned. I was in Pomona. But one of the officers, I'm not sure which one specifically, told my parole officer that I wasn't to be allowed a phone call, no one was to know where I was at, especially my family.

Q Were you present at the time of that conversation?

A Yes, sir, I was.

Q One of the officers then told your parole officer "Don't let anybody contact him or don't let his family know where he is"?

A Yes, sir.

Q What time of the day or night was this?

A I don't recall. Must have been in the afternoon. [fol. 114] I know it was still daylight outside.

Q The afternoon of what day?

A I'm sorry, I can't tell you the date.

Q Was it the day before you got to Temple City, or the same day?

A The same day, because I didn't stay overnight in Pomona; just for several hours, and then on to Temple City.

Q When did you talk to the officers and make this statement that they're talking about in Temple City?

A Just before I was taken to arraignment, I believe.

Q Was this on November 1st?

A I was under the impression it was the 2nd.

Q What time of day or night was it that you talked to Mr. Gilliland?

A This was—well, I had several conversations with them there. I think the particular conversation that we have in mind right now was in the morning.

Q Now, the talk about one officer to your parole of-

ficer on telephone calls, did that occur prior to your talking to Officer Gilliland at Temple City?

A Yes, sir, it did.

Q And your best recollection was that it was on the afternoon of the same day?

A Yes, sir.

[fol. 115] Q Even though the conversation that you had with Gilliland at Temple City occurred in the morning, is that right, sir?

A You do have me confused now. I'm—could I explain for just a moment, please?

THE COURT: Sure, go ahead.

THE WITNESS: Understand, during this time that I had been in solitary confinement in Las Vegas, in Pomona, I was upset. My days had all run together. All I was interested in actually was just seeing my family, my wife and baby, which I was able to do after I confessed to the police. Now, the police did promise me leniency, promised me that if I would waive all my rights, which I started to do until my wife told me "if you're not guilty, go ahead and fight." This is true. The officers, since that time, have arrested my wife until she's left the State in order to force me to plead guilty to this charge.

Q Did you make this confession because of anything to do with the telephone call, or was it just because of what you told us about—

A Accumulation of things.

Q What conversation was it about the telephone call that caused you to make a false confession. What did the police tell you about making a telephone call or seeing your wife?

A They told me nothing, except that—they said that [fol. 116] I wasn't to have—they informed the police I wasn't to have any phone calls, my family wasn't to know where I was at. They said—they did say that I could see my wife if I would confess, which I did, and I saw my wife immediately afterwards.

Q Prior to going to Las Vegas, had you been living with your wife?

A No, I hadn't.

Q You were separated from her?

A Yes, sir.

MR. TAYLOR: I have nothing further.

FURTHER EXAMINATION.

BY MR. DUNCAN:

Q How long had you been separated?

A I am not sure; not too long.

Q Approximately?

A Oh, probably—oh, maybe three weeks; but I saw my wife in the evenings and my baby.

Q Now, you mean during this two or three weeks you were separated?

A Yes, sir. I used to take my baby to Kiddyland.

Q All right. Now, you have difficulty recalling the —by the way, did you have a watch on when you were in jail?

A No, sir, I didn't.

[fol. 117] Q Did you have any difficulty in keeping track of the time during this period of incarceration?

A I had—yes, sir.

MR. DUNCAN: I have no further questions.

THE COURT: That's all, Mr. Stoner.

MR. TAYLOR: One question on the wife, your Honor.

THE COURT: All right, go ahead.

EXAMINATION

BY MR. TAYLOR:

Q Did you see your wife at Temple City, or was it at the Monrovia Court?

A It was at the Monrovia Court.

MR. TAYLOR: Nothing further.

THE WITNESS: Right after I had waived all my rights.

EXAMINATION

BY MR. DUNCAN:

Q About how long later at the Monrovia Court was it that you saw your wife after making this statement?

A Immediately after waiving my rights in court to an attorney; and of course the Judge told me then that I was almost pleading guilty.

Q What I'm interested in is how long after making this confession was it that you saw your wife in Monrovia Court? Have you any conception of the length of time?

[fol. 118] A It was the same day, because they were in a hurry to have this confession. They said they had to have me in court. Their Chief wanted the confession. If I didn't make it, he wouldn't go along. This was emphasized all along, that their Chief wanted this.

Q Did they tell you they had to arraign you that day?

A I don't remember whether they told me or I was under the impression that I was. I know that it was—seemed like everyone was pressed for time.

MR. DUNCAN: I have no further questions.

MR. TAYLOR: Nothing further.

THE COURT: That's all, Mr. Stoner. Step down, please.

Anything more on the subject?

MR. DUNCAN: I would, your Honor, object to the admission of any testimony.

THE COURT: I presume Mr. Taylor might have some testimony here.

MR. TAYLOR: Yes. Perhaps I better call Mr. Gilliland.

THE COURT: All right, put him back on. Take the stand, Mr. Gilliland.

CHARLES M. GILLILAND,

resumed the stand as a witness in behalf of the People, having been previously duly sworn testified on voir dire as follows:

[fol. 119] VOIR DIRE EXAMINATION

BY MR. TAYLOR:

Q Mr. Gilliland, prior to the conversation that you started to relate to us that occurred at the Temple City

Jail between yourself and Mr. Stoner while Officer Collins was present; prior to that time did you tell Mr. Stoner that if he plead guilty and named the other person and he went to court and waived his rights, refused the Public Defender, that the Chief would talk to District Attorney on his behalf and get a dismissal of the charges and put him, the defendant, on a straight parole violation?

MR. DUNCAN: I'm going to object to the question as being compound and complex.

THE COURT: Objection will be overruled. You may answer the question.

THE WITNESS: I did not.

Q BY MR. TAYLOR: Was there a statement in front of the parole officer, while Mr. Stoner was present, that he was not to have any calls?

A This might have been a statement made by Mr. Collins, but I didn't.

THE COURT: Well, did you hear it?

THE WITNESS: No, I did not.

THE COURT: Did you hear such a statement?

THE WITNESS: I did not.

THE COURT: Nevermind speculating on what some-

[fol. 120] one else may have done.

Q BY MR. TAYLOR: In your presence, the first question I asked you about the benefits and waiving rights, did Mr. Collins make that statement in your presence to the defendant?

A I did not hear it, no.

THE COURT: Well, did he make the statement in your presence, whether you heard it or not?

THE WITNESS: I don't know how to answer that.

THE COURT: Well, did you hear him make any statement as to that effect?

THE WITNESS: No, I did not.

THE COURT: All right.

MR. TAYLOR: I have no further questions.

CROSS EXAMINATION

BY MR. DUNCAN:

Q Now, his parole officer was there though, wasn't he?

A Yes, sir.
Q What's his name?
A Mr. Olsen.
Q Is he attached to the Pomona branch of the Parole Office?
A I am not sure. I believe that's a Riverside Branch.
[fol. 121] Q Did you make any statement to the defendant that if he would tell you who the—by the way, did you ask him who the other man was?
A Yes, sir.
Q And did you tell him that you would do anything for him if he would tell you who the other man was?
A No, sir.
Q Well, did you tell him you would see if he could be sent back on a straight violation?
A I never did discuss that with him at all.
Q Well, was there any statement about him pleading guilty? Did you ask him if he would plead guilty?
A No, sir.
Q What did you ask him about confessing anyway? Or did he just volunteer all this information?
A He was asked if he was involved in the robbery. This statement came from him about the robbery.
Q And so when you asked him if he was involved in the robbery, he said "Yes," I suppose?
A He said "Yes", after he had talked to his parole officer who advised him to cooperate with the police.
Q Well, did you tell him that if he would cooperate—did any of the other officers there present say if he would cooperate some type of favor would be granted?
A None at all.
[fol. 122] Q Well, were you present when one of the Deputy District Attorneys—one of the District Attorneys in Pomona made such—not in Pomona, but in Pasadena—made such an offer, that if he'd plead guilty, he'd be sent back on straight violation?
MR. TAYLOR: I will object unless it's prior to the conversation we are talking about.
THE COURT: Lay your foundation, Mr. Duncan.
MR. DUNCAN: Well, apparently this was later, your Honor. I have no further questions.
MR. TAYLOR: Nothing further.

THE COURT: That's all Mr. Gilliland.
Are you going to put Mr. Collins on?
MR. TAYLOR: Yes, I will call Mr. Collins.
THE COURT: Swear the witness, please.

FREDERICK E. COLLINS,

called as a witness in behalf of the People for voir dire examination, being first duly sworn, testified as follows:

THE CLERK: State your name, please.
THE WITNESS: Frederick E. Collins.

VOIR DIRE EXAMINATION

BY MR. TAYLOR:

Q What is your business or occupation?
A Police officer for the City of Monrovia.
Q Were you present on the first day of November, [fol. 123] 1960, at the Temple City Jail?
A Yes, sir.
Q And was there a conversation between yourself, Officer Gilliland, and the defendant, at that location?
A Yes, sir.
Q Did this occur in the morning?
A Yes, sir.
Q Prior to the time that Mr. Stoner here made his statement to you, did you or anybody in your presence tell Mr. Stoner that if he would plead guilty and name the other party, if he would go to court and waive his rights and refuse the Public Defender, that the Chief of the Monrovia Police Department would talk to the District Attorney on his behalf and cause the charges to be dismissed and send the defendant back on a parole violation?
A No, sir.
Q Did anything like that at all happen, or were any of those enumerated subjects mentioned to the defendant prior to the time that he spoke to you at Temple City Jail?
A No, sir.
Q Was there any statement made to the defendant in Pomona, in front of the parole officer, about telephone calls?

A In front of the parole officer, no, sir.

Q What about up to the time now that—of the con-
[fol. 124] fession in Temple City; what sort of statements had been made to Mr. Stoner concerning telephone calls and talking to his wife?

A The only statement that I can recall was as we were leaving the Detective Bureau of the Pomona Police Department to put Mr. Stoner in jail to await the arrival of his parole officer. This was in the afternoon of the 31st of October. Mr. Stoner said that he would like to call his wife. I told him that he could make a telephone call at the Temple Sheriff's Substation after he was booked in, but that I would rather he did not call his wife now. This was at that time because the second party who was involved in the robbery had not been positively identified and his whereabouts was unknown to me then.

THE COURT: Did you tell him that?

THE WITNESS: Yes, sir.

THE COURT: All right.

THE WITNESS: And that I would rather that he did not. But if he insisted, he could make a phone call when he was booked into the Temple City Sheriff's Substation.

Q BY MR. TAYLOR: Did you ever tell Mr. Stoner that unless he confessed to you, you would not let his telephone his wife?

A No, sir.

Q Did you condition his confession on seeing his wife?

A No, sir.

[fol. 125] Q When did Mr. Stoner see his wife?

A The afternoon of the arraignment.

Q When was that in relation to this confession we're talking about?

A I don't recall whether it was the same afternoon or the following afternoon.

MR. TAYLOR: I have nothing further.

THE COURT: You may cross examine.

CROSS EXAMINATION

BY MR. DUNCAN

Q Well, you saw the parole officer there, didn't you?

A At the Pomona Police Department, yes, sir.

Q That was on November 1st?

A No, sir, I believe it was on the 31st of October.

Q Was the 31st of October the date that this statement was made by the defendant?

A No, sir, it was on November 1st, the following morning.

Q All right. About what time was it you saw the parole officer?

A It was about 3:30—three or three-thirty in the afternoon.

Q Was there some statement made to the parole of-
[fol. 126] ficer that the defendant was not to make any telephone calls? And would not be allowed to make any?

A No, sir.

Q Was there any conversation there with the parole officer present about telephone calls?

A Not to my knowledge.

Q Well, you were there all the time, weren't you?

A No, sir.

Q Well, was there some time you were not there and your fellow officer, the fellow who just testified, wasn't present?

A No, sir.

Q One or the other of you were present at all times the parole officer was there?

A No, sir.

Q Who would be present with the defendant at the parole office?

A The parole officer and defendant were allowed to visit alone.

Q All right. After they visited alone, was there ever a time when someone was present there with the parole officer and the defendant, other than yourself and the previous witness?

A Not to my knowledge.

Q Did you ever give any orders, directions, or re-

[fol. 127] quests, to the Temple City Station at Pomona, City Station, that the defendant was not to be allowed to call out?

A No, sir.

Q Anyone do that in your presence?

A No, sir.

MR. DUNCAN: I have no further questions.

MR. TAYLOR: That's all.

THE COURT: That's all, Mr. Collins.

MR. DUNCAN: I will object, your Honor, to the introduction of any alleged confession or admission on the grounds that it was involuntary.

THE COURT: Is the matter submitted?

MR. DUNCAN: Submitted.

MR. TAYLOR: Submitted.

THE COURT: The objection is overruled. We will take our noon recess at this time. We will adjourn until 1:45 P.M.

(Whereupon an adjournment was taken until the hour of 1:45 P.M. of the same day, Tuesday, March 28, 1961.)

[fol. 128]

Los Angeles, California, Tuesday, March 28, 1961;
1:50 P.M.

(Whereupon the following proceedings were had in open court, within the presence and hearing of the jury:)

THE COURT: People against Joseph Lyle Stoner.

Let the record show the defendant is in court with counsel, the District Attorney is present, the jurors are present and in their places.

Mr. Gilliland, will you resume the stand, please?

You may proceed with your direct examination.

MR. TAYLOR: Thank you, your Honor. I will withdraw the last question and restate it.

THE COURT: All right.

CHARLES M. GILLILAND,

resumed the stand as a witness in behalf of the People, having been previously duly sworn, was examined and testified further as follows:

DIRECT EXAMINATION (resumed)

BY MR. TAYLOR:

Q Mr. Gilliland, would you tell us now what the defendant told you on November 1st, 1960, at the Temple City Jail?

A Yes. We asked him—

[fol. 129] THE COURT: Now, wait a minute before you go any farther.

You didn't talk in chorus, did you? You talked individually. You say "We asked him". Did two of you at one time ask him?

A No, individually, one at a time.

THE COURT: All right. Who asked who what.

THE WITNESS: I asked him if he was involved in the robbery of the Budget Town Market in Monrovia, and he replied that he was involved in it.

Q BY MR. TAYLOR: Now, you say "he"; is that Mr. Stoner?

A Yes.

Q Try and use names so that we keep it clear.

THE COURT: Go ahead, relate the conversation.

THE WITNESS: I asked him if the .45 automatic that we had in our possession was the gun that he had in the holdup, and he stated yes, it was the .45; however, he immediately stated that the gun was unloaded and he had the shells in his pocket.

I asked him if Pete had a gun also. He stated, "No, Pete did not have a gun. I was the only one that had the gun"; but again he stated the gun was unloaded, was not loaded.

He stated that they walked through the grocery store, that they did not case it to start with, they simply [fol. 130] walked through the store; that Pete picked up a Pizza, that they walked back to the stand. At that time he pulled the gun, held up the—Greely, the clerk.

Q BY MR. TAYLOR: He didn't—Mr. Stoner didn't use the word "Greely," did he?

A No, he did not.

Q What did he say?

A He stated that he held up the clerk, told him he wanted all the money that they had. He stated that from this they got eight hundred dollars cash and some checks, and that they made the man lay down and the girl lay down on him. He stated that they left, went out the back door, got in the car and left, the direction he doesn't remember, but during the ride he threw from the car his hat, the Pizza and the checks.

That they returned to Pomona and that Pete stated that he was going to San Bernardino to see a girl friend, "And that's the last I saw of him."

I asked him about the gun again, where he got the gun. He stated, "I won't tell you anything about the gun at all because it would involve innocent people and I see no reason to tell you. I'll just say this: That Pete and myself pulled the job and that's all."

Q Was that the extent of the conversation at Temple City?

A That's the extent of the conversation, of this con-
[fol. 131] versation.

Q At that time did you have in your presence the gun here in court, People's Exhibit 1?

A We had the gun with us at that time.

Q Did you show it to Mr. Stoner so he could see it?

A Yes, sir.

Q Is this about the time when he said or mentioned the conversation about the gun?

A I showed the gun to him and asked him if this was the gun, and he stated "That is the gun".

Q Were you present at the time that Mr. Stoner was arrested in Las Vegas?

A I was not present when he was arrested, no.

Q Did you see him in Las Vegas after he had been arrested?

A Yes, sir.

Q Did you at that time, in Las Vegas, see the hat that I think is People's Exhibit 2 for identification?

A When I first saw Mr. Stoner, he was wearing the hat.

Q People's 2?

A People's 2.

Q This is the hat that he said he was not wearing on the night of the robbery (indicating)?

A Yes. He stated that this hat he had purchased. [fol. 132] He threw his hat away when they left the scene, and this is the hat he had purchased in Lancaster.

MR. TAYLOR: I have no further questions.

THE COURT: You may cross examine, Mr. Duncan.

CROSS EXAMINATION

BY MR. DUNCAN:

Q Well, when was this conversation? Was this on the 30th?

A This conversation—the one in Temple City?

Q Yes.

A That was on the first day of November, about 10:30 A.M.

Q All right. Now, prior to that, you had had conversation with him?

A Conversation at Las Vegas and a very short conversation at the Pomona Police Deparetment.

Q And I would assume that you told him what you were arresting him for, didn't you?

A Yes, sir.

Q And you told him that it was in regard to a holdup?

A Yes, sir.

Q And that it had taken place on the 25th? You told him that, didn't you?

A Yes, sir.

[fol. 133] Q You told him the store that was robbed, didn't you?

A Yes, sir.

Q You told him that there were two men involved in it, didn't you?

A Yes, sir.

Q And you asked him if he had done it, didn't you?

A Yes, sir.

Q And he denied it up until November 1st, didn't he?

MR. TAYLOR: Is this going now to prior conversation other than November 1st?

Your Honor, if it is, I'll object that it's going beyond the scope of the direct.

THE COURT: I don't know. State your objection.

MR. TAYLOR: Unless this is directed to the conversation of November 1st, it goes beyond the scope of the direct examination.

THE COURT: The objection is sustained.

Q BY MR. DUNCAN: Well, in any event, prior to this conversation on the 1st, you had accused him of participation in this crime, isn't that right?

A Prior to the conversation at Temple City, the one pertaining to the one at Las Vegas, we had asked him if he—told him why the was being arrested and asked him [fol. 134] if he was involved.

Q And you told him there were two men involved in this holdup?

A Yes, sir.

Now, during this—between the time—by the way, when did you arrive in Los Angeles County after your return from Las Vegas?

A We arrived in Los Angeles County on Monday, which would be the 31st of October, in the afternoon.

Q Did you testify at the preliminary hearing?

A No, sir.

Q Who else was present with you when this conversation took place?

A This conversation in Las Vegas?

Q No, this one on the 1st of November at Temple City Station?

A Officer Collins.

Q Now, you had this gun with you, People's 1?

A Yes, sir.

Q By the way, do you know anything about firearms?

A Very little of an automatic.

Q Well, tell me, do you know enough to be able to tell us if a gun is cocked back in that position (indicating), whether it can fire?

A With the slide back?

Q That's right, like it is now.

[fol. 135] A It can't fire until it slips forward.

Q And when it's in a position like that, I take it then it would be impossible to fire it by pulling the trigger, is that right?

A I don't believe it's possible.

Q Thank you. Now, prior to this statement of the defendant, did he ask if he could see his wife?

A He did not ask me if he could see his wife.

Q Well, did he ask someone else while you were within earshot?

A I did not hear a request of Mr. Stoner to see his wife.

Q Well, did you tell anyone that he was not to be able to call out until you had located the other man?

A I did not.

Q Did you hear anyone else make that statement?

A I did not hear that statement.

Q Was that statement made by anyone that you know of?

A It was made by Officer Collins.

MR. DUNCAN: I have no further questions.

REDIRECT EXAMINATION

BY MR. TAYLOR:

Q What was the reason that Officer Collins didn't want anybody to call the defendant?

[fol. 136] MR. DUNCAN: I am going to object to that, your Honor, as a conclusion.

THE COURT: Objection will be overruled; if you heard Collins say what the reason was.

MR. DUNCAN: Then I would object that it would be hearsay.

THE COURT: Objection will be overruled.

THE WITNESS: He stated that the reason that he did not wish for him to make the call at this time to his wife is because he did not know who the second man was, or was not sure of who the second man was, and that if he called his wife this may lead to the fact she would tell the second one.

Q BY MR. TAYLOR: Was there any conversation as to who occupied that room at the Mayfair Hotel, Room No. 404?

A Yes, sir.

Q What was that conversation?

A I asked Mr. Stoner if he liked in Room 404 at the Mayfair Hotel, and he stated that he did.

MR. TAYLOR: I have nothing further.

THE COURT: Anything further, Mr. Duncan?

MR. DUNCAN: Nothing further.

THE COURT: That's all, Mr. Gilliland.

MR. TAYLOR: Call Officer Collins, your Honor.

THE COURT: All right. You have been sworn. You [fol. 137] are still under oath.

FREDERICK E. COLLINS,

called as a witness in behalf of the People, having been previously duly sworn, was examined and testified further as follows:

DIRECT EXAMINATION

BY MR. TAYLOR:

Q Mr. Collins, what is your business or occupation?

A Police officer for the City of Monrovia.

Q Were you present at the time that Room 404 of the Mayfair Hotel in Pomona was searched?

A Yes, sir.

Q Did you recover the gun?

A Yes, sir.

Q Where did you recover the gun?

A Underneath the bottom drawer of the bureau.

Q Showing you People's Exhibit 1, is this the gun you recovered?

A Yes, sir.

Q Now, showing you Exhibit 9, the clip, where was that clip when you first observed it?

A As I recall, it was in the handle of the automatic pistol.

Q That's Exhibit 1?

A Yes, sir.

[fol. 138] Q Were there any bullets near where the gun was found?

A Yes, sir.

Q Are these the bullets that are in Exhibit A?

A Yes, sir.

Q How many bullets did you find in the toilet tissue near the gun?

A Eight bullets.

Q How many bullets fit into the clip, this clip now before you?

A Seven bullets.

Q In other words, there was one extra bullet more than fits into the clip?

A Yes, sir.

Q Did you keep those objects in your control until they were booked into evidence?

A Yes, sir.

MR. TAYLOR: I have nothing further.

THE COURT: Cross examine.

CROSS EXAMINATION

BY MR. DUNCAN:

Q Well, were there any bullets in this clip when you found it?

A No, sir.

Q Was the clip snapped up into the handle of that fire-[fol. 139] arm?

A As I recall it was.

Q Did you have any fingerprints taken?

A No, sir.

MR. DUNCAN: I have no further questions.

THE COURT: That's all, Mr. Collins.

MR. TAYLOR: Excuse me, your Honor.

THE COURT: I wish you would exhaust your inquiry before you turn him over for cross examination, Mr. Taylor.

MR. TAYLOR: I'm sorry, your Honor.

THE COURT: All right, go ahead.

REDIRECT EXAMINATION

BY MR. TAYLOR:

MR. TAYLOR: I have a photograph. May this be marked People's Exhibit next in order?

THE COURT: 10.

Q BY MR. TAYLOR: Mr. Collins, were you present at the time that People's 10 was taken, that photograph?

A Yes, sir.

Q Is that a photograph of the defendant?

A Yes, sir.

Q Was that made shortly after he was brought back to this County?

A Yes, sir.

[fol. 140] MR. TAYLOR: Nothing further.

MR. DUNCAN: Nothing further.

THE COURT: All right, that's all, Mr. Collins. Your next witness.

OFFERS IN EVIDENCE

MR. TAYLOR: Your Honor, at this time the People ask that the hat, People's Exhibit 2 for identification, be received into evidence.

THE COURT: It will be received as marked.

MR. TAYLOR: Also move that People's 5, that's the composite photograph, be received in evidence.

THE COURT: It will be received as marked.

MR. TAYLOR: Might I make an inquiry of the clerk as to what happened to People's Exhibit 7?

THE COURT: Well, I don't know. It's a photograph.

MR. TAYLOR: Ask that People's 10 the photograph taken after the arrest be received in evidence.

THE COURT: It will be received as marked.

MR. TAYLOR: The People rest.

THE COURT: How about 6 and 7?

MR. TAYLOR: Well, I don't know at this time whether I have connected them up well enough.

THE COURT: Any objection, Mr. Duncan? 6 is the check book and 7 is the Pomona Police Department photograph.

MR. DUNCAN: Yes, your Honor, I will object.

THE COURT: You're not offering them?

MR. TAYLOR: No, I'm not offering them.

[fol. 141] PLAINTIFF RESTS

THE COURT: All right. The People rest?

MR. TAYLOR: The People rest.

THE COURT: The case is with the defense.

MR. DUNCAN: Yes. I'll waive opening statement, your Honor.

THE COURT: All right, you may call your first witness.

MR. DUNCAN: Jean Shepherd.

DEFENSE

JEAN ELAINE SHEPHERD,

called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

THE CLERK: State your name, please.

THE WITNESS: Jean Elaine Shepherd.

DIRECT EXAMINATION

BY MR. DUNCAN:

Q Mrs. Shepherd, do you know the defendant Mr. Stoner here?

A Yes, sir.

Q And is there some relationship—is there any relationship with Mr. Stoner?

A Well, he is—he's my husband's step-brother, which actually there's no relation between the two of us.

[fol. 142] Q I see. Now, are you still married to his brother?

A No, sir.

Q Now, calling your attention to October 25th of last year—that is, 1960—did you see the defendant Joseph Stoner?

A Yes, sir.

Q Where did you see him?

A At my home.

Q About what time was that?

A Well, sir, I get off work at five and I have to go by and pick my children up at my mother's house; and ordinarily I stay there until around six, and I had gone home and had nearly completed dinner when Joe got there.

THE COURT: What time was it?

THE WITNESS: It was some time after seven, I would say.

Q BY MR. DUNCAN: How long did he remain there?

A Oh, approximately an hour and 45 minutes, two hours, something like that.

Q And then I take it he left, is that right?

A Yes, sir.

Q And he left in the vicinity of 9 o'clock?

A Yes, sir, around there.

Q Now, what was done during this time; anything [fol. 143] unusual?

A Well, like I said, he got there when we were completing dinner, eating; and Joe stayed until we had finished and then we had coffee together, and Joe was preparing to leave and a friend of mine came by.

Q And his name, please?

A Johnny Berkshire.

Q And about what time did he drop by?

A Well, I'm not exactly certain, but I'd say 8:15.

Q Now, what were you and Mr. Stoner doing during this period?

A Talking.

Q And talking about any robberies, or anything like that?

A Of course not. No, we were talking about his wife and my husband.

Q All right. Now, about how long—by the way, this other fellow that came over, did he leave before Mr. Stoner did, or after Mr. Stoner?

A I believe they left around the same time. I really couldn't say for certain.

Q All right. Did Mr. Stoner do anything while he was there at the house?

A What do you mean, sir, did he do anything?

Q Well, did he do anything for your children, or [fol. 144] anything of that nature?

A Yes, sir, he and Johnny—well, Johnny set up his electric train and Joe helped run it.

Q Now, what makes you remember this particular day, that is, October 25th, 1960?

A That was very hard for me to remember. When he called me last evening and asked me what I was doing on October 25th at 8 P.M., I couldn't remember to be very truthful with you; but it so happens that my car broke down one month prior to this, September 24th, to be exact, and I had my car broken down for a whole month with the transmission gone on it. Well, the Saturday before this Tuesday, Joe, my brother, and my father, put the transmission back in my car and it didn't run. After a whole month without a car, it didn't run. So the next day, Sunday, my brother and I took the car back over to Riverside where they had fixed my transmission and left the car with them. And it was the next day, Monday evening, I'd say around six, when my mother and father brought my car back from Riverside, and Joe was also there at that time. And so it was exactly one month to the day that my car had been out of commission and I was tickled to death to get it back. And it was the next evening then, was the time that Joe was there. And so if it hadn't been for that and I had the records to prove that was the time my car had been broken down—if it hadn't been for that, frankly, I [fol. 145] wouldn't have remembered.

Q All right. Now, have you talked to Joseph Stoner since his arrest?

A Sir, I didn't even know he had been arrested until approximately a couple of months after he had been arrested. I had worried about him—

THE COURT: Wait a minute. You can answer that question simply.

THE WITNESS: No, not at all.

Q BY MR. DUNCAN: Now, had you written him any letters or has he written you any letters?

A No, I didn't even know where he was.

Q All right. Now, have you discussed this case with anyone other than myself?

A Well, I haven't even had an opportunity hardly to discuss it with you.

MR. DUNCAN: I have no further questions.

THE COURT: You may cross examine.

CROSS EXAMINATION

BY MR. TAYLOR:

Q In October of 1960, Mrs. Shepherd, how many times did you see this defendant?

A Just about every night of that week that my car was being put back together.

Q Let's see, your car was being put back together [fol. 146] then starting with October 22nd, the Saturday previous to this happening?

A Yes.

Q Pardon?

A Yes.

Q Had you seen the defendant prior to October 22nd of 1960, during the month of October?

A Yes.

Q How many times had you seen him from October 1st to October 22nd?

A I'd say approximately three or four times.

Q Was that at your home or where?

A On occasions it was my home. One evening Joe and myself and a friend of his and another girl went out.

Q Now, for the week that your car was being fixed—it was being fixed from October 22nd, then, until seven days later, October 29th, is that correct?

A No, sir, that's not correct. My car was broke down in September, and it was September 24th whenever it was broke down; and I didn't have the money to have it fixed. And so it sat parked in my dad's yard up until say approximately the middle of October. And then my mother and father felt sorry for me and loaned me the money to have the car fixed.

Q Your car broke down September 24th, is that right? [fol. 147] A Yes, sir.

Q And it was one month from September 24th that the car was fixed?

A No, not that—it was fixed before. It had been fixed, but it didn't run after it had been fixed. So they took it back and had it fixed again. Actually they took it back and they took the transmission out completely.

Q The day they fixed the transmission was what day?
A The day they fixed the transmission?
Q For the first time?
A I really couldn't say that exact date, because my father has the bill on that in his name, and he couldn't locate it last night the first time it went in.
Q I understand that you are able to remember this particular Tuesday evening because the Saturday before this defendant Joe Stoner fixed your car for the first time in a month, is that correct; or am I misunderstanding?
A Well, slightly. You see my brother and my dad pulled the transmission out of my car and they took it in to have it fixed to save money.
Q When was this?
A This was in the middle of October.
Q Do you remember the date?
[fol. 148] A I believe it was around the 12th or 15th, around that time.
Q Was the defendant present at that time?
A No, sir.
Q All right. Did that fix the car?
A No, it didn't.
Q Was there anything done to the car thereafter?
A Yes, sir.
Q What was the next thing that was done to the car?
A The next thing that was done to the car was my father picked up the transmission on Friday the 21st, I believe, and Joe and my brother and my dad put the transmission back in the car that Saturday after I got off work at noon. And it was then—I was so happy because the transmission was finally fixed—I got in the car and it wouldn't run.
Q Now, what happened one month to the day after your car broke down?
A I got it back.
Q Got it back from where?
A Finally got it back in running condition from Riverside.
Q Was this on the 24th of October that you got the car back?
A Yes, sir.

[fol. 149] Q This was the day before this incident happened?

A This was on a Monday, yes, sir.

Q You said something about a week, every day you saw the defendant. When was that week?

A I didn't say I saw him every day; I said I saw him approximately every day during that week that they were working off and on the car.

Q This was the week of what?

A This was the week prior to what we're discussing now, the 25th.

Q I show you a calendar for 1960. Now, what dates are you talking about was the week that you saw Mr. Stoner nearly every day?

A The week between the 16th and the 22nd.

Q All right. Did you see Mr. Stoner then on the 23rd of October, a Sunday?

A No, sir, I didn't.

Q Did you see him on the 24th?

A Yes, sir.

Q This was one month after your car had broken down?

A Yes, sir.

Q Now, did you see him again on the 25th?

A Yes, sir.

Q How about on the 26th?

[fol. 150] A No, sir, I don't believe I did.

Q Well, are you sure about that, ma'am?

A Yes, I am certain about that.

Q How about on the 27th or the rest of that particular week?

A I don't believe I saw Joe at all after the 25th.

Q The last time that you saw this defendant then is on the 25th of October of 1960?

A Yes, sir.

Q The date that the robbery occurred?

A Well, I don't even know what date that was.

Q When did you first find out that he had been arrested?

A Oh, approximately a month afterward.

Q This would have been then somewhere around November 25th?

A Well, I can't say for certain.
Q Some time around Thanksgiving?
A Yes, as a matter of fact it was around Thanksgiving.
Q Did you make any sort of inquiries about what he had been arrested for?
A How I happened to find out about it, is after I stopped seeing Joe I called this hotel and then his mother is—well, actually his stepmother takes care of the chil-
[fol. 151] dren, and wanted the children during the Thanksgiving week there.
Q The question is: Did you ask somebody why he had been arrested, this fellow that had helped fix your car?
A Well, his mother told me he had been arrested and I naturally asked her why.
Q Did you determine that this man had been arrested for a crime that occurred on October 25th of 1960?
A I didn't know that the crime had occurred on that date until last night.
Q Did you ask any questions about it?
A When? Last night?
Q No, around Thanksgiving?
A Yes, I asked why he had been arrested.
Q What did they tell you?
A They—his mother told me that far as she knew that he was being held for suspicion of robbery.
Q Did you make any further inquiries at that time?
A No.
Q Did you contact him at the jail or try and find where he was located?
A No.
Q Did you send him anything for Christmas?
A No.
[fol. 152] Q That was the last inquiry that you made then, around Thanksgiving you talked to his mother?
A Oh, no. Periodically since that time I had asked—had talked to his wife and asked how Joe was coming along and everything, and if there was anything I could do or if I could send him anything. And—as a matter of fact I didn't even know where he was, sir.

Q Did you ask Mrs. Stoner what he was arrested for?
A Which Mrs. Stoner?
Q The wife that you're talking about.
A Yes.
Q Did she tell you what he had been arrested for?
A She said "Armed robbery".
Q Did she tell you any of the details of it?
A No, sir.
Q Did you ask any of the details?
A No, sir.
Q Did you read anything about this in the newspaper?
A No, sir, I did not.
Q Where is your home located?
A I beg your pardon, sir?
Q The place where you last saw Mr. Stoner?
A Where he was living at the time?
Q No, where is your house located?
A Oh, my house, excuse me, I misunderstood you. 725 North Allen Avenue.
[fol. 153] Q Where is that?
A In Ontario.
Q Did you have an arrangement for the defendant to come over to dinner this particular evening after you saw him?
A No.
Q He just happened to come?
A Yes.
Q How about Mr. Berkshire; did you ever have any arrangements for him to come to the house?
A Johnny usually comes over on Tuesday evenings.
Q He doesn't come over every Tuesday, though?
A Not every Tuesday, no.
MR. TAYLOR: I have nothing further.
THE COURT: Anything further, Mr. Duncan?
MR. DUNCAN: Nothing further. May this witness be excused?
THE COURT: Yes, you may be excused.
MR. DUNCAN: John Berkshire.

JOHN S. BERKSHIRE,

called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

THE CLERK: State your name, please.
THE WITNESS: John Berkshire.

[fol. 154] DIRECT EXAMINATION

BY MR. DUNCAN:

Q Mr. Berkshire, calling to your attention October 25th, last year, did you see the defendant Joseph Stoner?
A Yes, I did.
Q And about what time was it that you saw him?
A It was between eight and eight-thirty.
Q And where did you see him?
A At Jean Shepherd's house.
Q Did you know Mr. Stoner at that time?
A We had met before, yes.
Q How many times had you met?
A I imagine around two or three.
Q Is there any blood relationship or any relationship by marriage to the defendant Mr. Stoner and yourself?
A None.
MR. DUNCAN: I have no further questions.
THE COURT: You may cross examine.

CROSS EXAMINATION

BY MR. TAYLOR:

Q How long did you stay at Jean Shepherd's house?
A I don't really have any idea. It wasn't a long time, but I know it was at least over—over 15 minutes, may-[fol. 155] be—maybe an hour.
Q The two or three times other than October 25th that you saw this defendant, was that before October 25th or after?
A That was before.
Q Would you tell us the dates of the two other times that you saw this defendant?
A They were within a—oh, a two-week period, I guess before that.

Q Before October 25th?

A Yes.

Q Do you recall the date of the week that you saw him on either of these other two occasions?

A No, I don't.

Q Do you recall where it was that you saw him on either of these other two occasions?

A Yes, they were both—both at Mrs. Shepherd's house.

Q Did you visit Mrs. Shepherd's house often?

A Yes.

Q Now, how about the week of October 16th through the 22nd; did you see this defendant at any time during that week?

A Through the 22nd?

Q Yes, 16th through the 22nd.

A Yes.

[fol. 156] Q How many times?

A That's probably the other two times that I had met him.

Q What's probably the other two times?

A Well, that's the two weeks before, that I mentioned.

Q Which day in all of those days did you see him, from October 16th through October 22nd?

A I couldn't give you any definite date on it—oh—between—between that two weeks. I know one time I think was on a Wednesday, and the other time I believe was on Thursday.

Q Was that then Wednesday the 19th and Thursday the 20th of October, 1960?

A Very possibly.

Q Was it, sir? Do you recollect?

A No, I don't.

Q You don't remember those other two days, do you?

A Not as a date, no.

MR. TAYLOR: Nothing further.

REDIRECT EXAMINATION

BY MR. DUNCAN:

Q Is there any reason why you can recall this particular Tuesday, this last time you saw Mr. Stoner?

[fol. 157] A Yes, there is.

Q What is that?

A I date it from Miss Shepherd's car. I think it was the first day that she—she brought it to work. She works across the street.

Q And do you usually take her to work?

A I have, yes.

Q After her car was repaired, did you take her to work?

A No.

Q But you did while the car was broken down is that it?

A Uh-huh.

MR. DUNCAN: I have no further questions.

RECROSS EXAMINATION

BY MR. TAYLOR:

Q What day was it that you last took Miss Shepherd to work?

A It was during the week. What was it—Monday.

Q I show you a calendar for 1960. Tell me what day of the week?

A Must have been the 24th.

Q You just took Miss Shepherd to work on October 24th, is that correct?

A Yes.

[fol. 158] MR. TAYLOR: Nothing further.

MR. DUNCAN: I have nothing further.

THE COURT: That's all, Mr. Berkshire. You may be excused.

Your next witness.

MR. DUNCAN: The representative from the Bank of America.

Your Honor, I wonder if I might have a moment. I, quite frankly, have not spoke to him.

THE COURT: All right, we will take an afternoon recess, Mr. Duncan.

MR. DUNCAN: Thank you.

THE COURT: Remember, ladies and gentlemen, not to discuss this matter among yourselves or with others, or

to form or express any opinion until it is submitted to you.

You may go upstairs to the jury room and we will call you down in a few minutes.

(Afternoon recess.)

THE COURT: People against Joseph Lyle Stoner. Let the record show the defendant is in court with his counsel, the District Attorney is present, the jurors are present and in their places.

You may call your next witness.

MR. DUNCAN: Yes, your Honor.

[fol. 159] HAROLD D. MUEHLBERGER,

called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

THE CLERK: State your name, please.

THE WITNESS: Harold D. Muehlberger.

DIRECT EXAMINATION

BY MR. DUNCAN:

Q Sir, pursuant to a subpoena did you bring certain credit records of a Joe L. Stoner?

A Yes, I did.

Q And you keep certain records for the Sears-Roebuck Company?

A I beg your pardon?

Q Do you keep certain records for the Sears-Roebuck Company?

A Yes.

Q In what capacity are you employed?

A Assistant Credit Manager of the Pomona Store.

Q That's the Sears-Roebuck store?

A Yes.

Q Do your records reflect a purchase on October 28, 1960?

MR. TAYLOR: Your Honor, I object. The best evidence of what the records reflect are the records themselves.

THE COURT: Do you have the records?

MR. DUNCAN: Well, the records are on microfilm,
[fol. 160] THE COURT: Have you seen them?
MR. TAYLOR: No, your Honor.
THE COURT: Well, show them to counsel. He is entitled to see them, Mr. Duncan.
MR. DUNCAN: All right. Then I would suggest that a viewer be brought up so that they can be looked at, your Honor.
THE WITNESS: They are on microfilm.
THE COURT: Well, have you transcribed them some way or other so we can see them?
THE WITNESS: Just in my own handwriting. I have made a copy.
THE COURT: Come up here and take a look at them, Mr. Taylor.
Go ahead, Mr. Duncan. Read the last question, please.

(Whereupon the last question was read by the reporter as follows:

"Q Do your records reflect a purchase on October 28th, 1960?")

THE WITNESS: Yes, they do.
Q BY MR. DUNCAN: And where was that purchase made?
A The purchase was made at the Lancaster Sears-Roebuck store.
Q And that was on the 28th of October?
[fol. 161] A October 28th, 1960.
Q And did that purchase slip mention a hat, list a hat?
A Yes, it did.
Q And what was the price of that hat?
A $5.98.
Q And sir, do you have with you any part of a catalogue depicting certain hats that your store sells?
A Yes, I do.
Q May I see that so I can show that to counsel?
Now, showing you the hat, People's—I don't recall the number.
THE COURT: 2.

Q BY MR. DUNCAN: People's Exhibit 2. Can you tell me, by comparing the catalogue with that hat, whether that is one of the hats that your store sells?

A It appears to me to be identical with this one. (Indicating).

Q You are making reference to a hat that is numbered 33PC856?

A Correct.

Q That is a catalogue number, is it?

A Yes, it is.

Q And what make of hat is that your catalogue depicts?

A As it shows on this, Pilgrim. That's a brand name. [fol. 162] Q Is that the name that is inside of People's 2?

A Yes, it is.

Q And what price does that hat sell for, that particular model that you referred to?

A It is in the $5.98 price range.

MR. DUNCAN: I have no further questions.

CROSS EXAMINATION

BY MR. TAYLOR:

Q Your store sells a good number of these hats, doesn't it?

A Yes, it does.

MR. TAYLOR: No further questions.

THE COURT: That's all, Mr. Witness. Thank you very much. You may be excused.

Your next witness.

MR. DUNCAN: I will call the representative of the Bank of America.

JAMES E. HASTINGS,

called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

THE CLERK: State your name, please.

THE WITNESS: James E. Hastings.

[fol. 163] DIRECT EXAMINATION

BY MR. DUNCAN:

Q Mr. Hastings, your business or occupation?
A I work for the Bank of America as lending officer.
Q What branch?
A Pomona main branch.
Q You brought with you certain records pursuant to subpoena?
A Yes, I have an application for a loan and a credit statement.
Q All right. May I see those for a moment so I can show those to counsel?
THE COURT: Go ahead, Mr. Duncan.
Q BY MR. DUNCAN: Sir, are these records kept in the ordinary course of business?
A I didn't hear you, sir.
Q Are these records kept in the ordinary course of business?
A Yes.
Q Do you have charge of the keeping of these records?
A Indirectly, yes.
Q And do these records reflect that a loan was made to Mr. Stoner?
MR. TAYLOR: I don't know whether that's a proper [fol. 164] foundation or not. I will object on the grounds there is not a proper foundation.
THE COURT: Objection overruled.
Q BY MR. DUNCAN: Do the records reflect that a loan was made to Mr. Stoner in the month of October of 1960?
A Yes.
Q And how much was that loan for?
A The loan was for $170.00.
MR. DUNCAN: I have no further questions.
THE COURT: Any questions?

CROSS EXAMINATION

BY MR. TAYLOR:

Q Do you know whether this was this particular man here in court?

A Yes.
Q Did you personally make this loan?
A Yes.
Q Dealing with this defendant?
A Yes.
Q What was the date of the loan?
A The loan was granted on October 21st.
Q 1960?
A Yes.
Q Was that the date that the money was transferred?
[fol. 165] A Yes.
Q When was the application made?
A The application was made on the 19th.
MR. TAYLOR: No further questions.

REDIRECT EXAMINATION

BY MR. DUNCAN:

Q Did he tell you at that time the purpose of the loan?
A The purpose of the loan was to pay various bills that had accumulated due to the wife's separation.
MR. DUNCAN: I have no further questions.
THE COURT: That's all, Mr. Hastings. Thank you, sir. You may be excused.
You may call your next witness.
MR. DUNCAN: Mr. Gilliland, will you please take the stand?
THE COURT: As a defense witness?
MR. DUNCAN: Yes, your Honor.
THE COURT: You have been sworn, Mr. Gilliland. Just be seated. You are still under oath.

[fol. 166] CHARLES M. GILLILAND,

recalled as a witness in behalf of the defendant, having been previously duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DUNCAN:

Q Sir, prior to your testifying today that the defendant had told you that he had thrown his hat out that

he had used in this robbery, did you hear me say to the Deputy District Attorney here, Mr. Taylor, that it's ridiculous, that hat couldn't have been used, the hat was purchased up at Lancaster after this robbery?

MR. TAYLOR: Calling for something that counsel said here in court, your Honor, is completely immaterial. I will object.

THE COURT: The objection is sustained.

Q BY MR. DUNCAN: Well, you have been in the courtroom all day today, haven't you?

A No, sir.

Q Well, a good part of the day have you, during this trial?

A Yes, sir.

Q And you remained here—I'll go into that later.

No further questions.

THE COURT: That's all, Mr. Gilliland.

You may call your next witness.

[fol. 167] DEFENDANT RESTS

MR. DUNCAN: The defense rests.

THE COURT: Any rebuttal?

MR. TAYLOR: No, your Honor.

THE COURT: You may proceed with your opening argument.

MR. TAYLOR: I wonder before we do that if I might move the Court to have a conference about the instructions that you intend to give?

THE COURT: Yes, I think that might be well; and I think it might be well also to put the matter over until tomorrow morning for arguments so that the entire matter can be disposed of in one session.

Ladies and gentlemen, the Court admonishes you again not to discuss this matter among yourselves or with any other person, or to form or express any opinion in the matter until it is submitted to you. The matter will be continued until tomorrow morning at 9:30 for arguments and instructions, and you will return at that time, please.

You may be excused.

(Whereupon the jury left the room.)

THE COURT: We will go into chambers.

(Whereupon a discussion was had in chambers concerning the jury instructions to be given.)

(Whereupon an adjournment was taken until the following day, Wednesday, March 29, 1961; 9:30 A.M.)

[fol. 168]

Los Angeles, California, Wednesday, March 29, 1961; 9:30 a.m.

THE COURT: People against Joseph Lyle Stoner. Let the record show the defendant is in court with counsel, the District Attorney is present, the jurors are present and in their places.

You may proceed with your opening argument.

(Opening argument by Mr. Taylor.)

THE COURT: Mr. Duncan?

(Argument by Mr. Duncan.)

THE COURT: Mr. Taylor?

(Closing argument by Mr. Taylor.)

(Instructions by the Court.)

(Whereupon at 11:20 a.m. the jury left the courtroom to deliberate.)

[fol. 169]

Los Angeles, California, Thursday, April 6, 1961; 9 A.M.

THE COURT: People against Joseph Lyle Stoner.

MR. DUNCAN: Yes, your Honor.

THE COURT: This is the time set for judgment and sentence, Mr. Duncan.

MR. DUNCAN: Yes, your Honor.

THE COURT: Is there any legal cause at this time why judgment and sentence should not now be pronounced?

MOTION FOR A NEW TRIAL AND DENIAL THEREOF

MR. DUNCAN: Your Honor, at this time the defendant moves, under Section 1181 of the Penal Code, Subsections 5 and 6, for a new trial. I will submit the matter.

THE COURT: You want to submit the matter without further argument?

MR. DUNCAN: Yes, your Honor.

MR. TAYLOR: I will submit it.

THE COURT: The motion is denied.

Joseph Lyle Stoner is your true name?

THE DEFENDANT: Yes, sir.

THE COURT: Heretofore and on November 28, 1960, by Information No. 235898, you were charged in that Information with the crime of robbery, a felony, the Information alleging two prior convictions of a felony.

Thereafter and on December 1st you were arraigned, and a motion to dismiss under Section 995 was interposed in your behalf and continued until December 8th; and [fol. 170] on that date the motion to dismiss was denied.

You entered a plea of not guilty to the charge contained in the Information. You denied the priors alleged.

Trial of the matter was set for December 15th in the Pasadena Department of the Court. On December 15th the matter was continued until January 30th and transferred to Department 1 here for setting in this location in the Civic Center.

On December 19th, 1960, the case was reset for trial for February 9th in Department 110. On February 9th, 1961, the matter was transferred to Department 106 for further proceedings; and on February 9th it was transferred from Department 106 and the Public Defender was relieved at that time in Department 110, and the matter was continued until March 10th for trial.

On March 10th Mr. Duncan appears as your attorney and it was ordered continued until March 27th for trial.

On March 27th the matter was transferred to this department for trial; and you, upon rearraignment, admitted the prior convictions of a felony alleged. The matter proceeded to trial before a jury.

The jury, after having heard the evidence, returned a verdict of guilty as charged in the Information and

found the allegation that you were armed at the time of the commission of the offense to be true and fixed the [fol. 171] degree of the offense as robbery in the first degree.

The matter was continued until this morning for judgment and sentence.

Is there any legal cause at this time why judgment and sentence should not now be pronounced, Mr. Duncan?

MR. DUNCAN: There is none, your Honor.

JUDGMENT AND SENTENCE

THE COURT: It is the judgment and order of this Court, Joseph Lyle Stoner, that for the crime of robbery upon which you have been found guilty and which the jury has fixed as robbery in the first degree, there being no legal cause why judgment and sentence should not now be pronounced, that you be sentenced to the State Prison for the term prescribed by law.

You having admitted the two prior convictions of a felony alleged in the Information, and it appearing that those two prior convictions come within the provisions of Section 644 Subdivision a of the Penal Code, it is the judgment and order of this Court that you be declared a habitual criminal.

You are ordered remanded to the Sheriff of Los Angeles County, to be by the Sheriff delivered to the Director of Corrections at the California Institution for Men at Chino, California, in the usual course of his business.

[fols. 172-174]: * * *

[fol. 175]

* * * *

IN THE DISTRICT COURT OF APPEALS OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION TWO

Criminal No. 7753

* * * *

THE PEOPLE, PLAINTIFF AND RESPONDENT

v.

JOSEPH LYLE STONER, DEFENDANT AND APPELLANT

* * * *

[fol. 176] APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. Clement D. Nye, Judge. Affirmed.

Prosecution for robbery. Judgment of conviction of first degree robbery, affirmed.

Anderson, Griffin & Massey and Donald G. Griffin for Defendant and Appellant.

Stanley Mosk, Attorney General, and Elizabeth Miller, Deputy Attorney General, for Plaintiff and Respondent.

OPINION—June 26, 1962

ASHBURN, J.—Defendant was convicted of robbery in the first degree, was found to be an habitual criminal on the basis of two admitted priors, and was sentenced for the terms prescribed by law. He bases his appeal on the contentions that certain evidence was obtained as a result of an unlawful search and seizure and that his confession, also in evidence, was not voluntary.

At about 8 o'clock in the evening of October 25, 1960 a robbery occurred at the Budget Town Food Market in Monrovia. Two men entered the store and ordered David Greely, a clerk, to put money in a sack. One of the men was holding a gun. They then ordered the clerk to lie on the floor and ordered Donna May Ray, another employee, to lie on the floor next to him. They then departed with

the money. Defendant was arrested a few days later in Las Vegas and subsequently confessed. His partner in [fol. 177] crime, Peter Schales, was also apprehended and testified on behalf of the People. Defendant was identified as the man holding the gun by the two market employees.

The facts leading up to defendant's arrest, and on which the argument of illegal search is based, are as follows: Shortly after the robbery Greely called the police and described the robbers, describing the one holding the gun as being 35-40 years of age, about 5 feet 10 inches, wearing a gray shirt, a gray "coat-sweater" and gray hat, horn-rimmed glasses, and as having a dark complexion. Officer Gilliland investigated the robbery and testified that the manager of the market gave him a checkbook, saying it had been found in the parking lot to the rear of the store shortly after the robbery. Defendant's name was in the checkbook. The officer called the Bank of America, checked the account number and found the account registered in defendant's name. Two of the check stubs referred to rent payments made to the Mayfair Hotel. Gilliland then went to the Pomona Police Department to see if defendant had a record. He discovered that defendant had a record of robbery and murder. He obtained a photograph of defendant and took it to the market to show the victims. They said that the photograph looked like the man that held the gun. He then continued his record check and at about 10 o'clock that night, October 27, he went to the Pomona Police Department with Officer Collins and discussed the Mayfair Hotel with two detectives and left with them and Officer Collins for the Mayfair at about 11 p. m. They entered the lobby, approached the night clerk, and asked about defendant. They were told he lived in the hotel in room No. 404, but that he was out. The clerk said he knew defendant was out because hotel regulations required that tenants' keys be placed in their mail boxes when they left the hotel, and defendant's key was in his box. The officers requested permission to enter the room, explaining that they wished to make an arrest of a man who had possibly committed a robbery. The clerk stated, "In this case, I will be more than happy to give you permission and I will take you directly to the

room." They went to defendant's room, the night clerk placed the key in the lock, unlocked the door and said "Be my guest." The officers entered the room and observed a pair of horn-rimmed glasses on a desk. On closer examination they resembled the glasses described by the victims as having been worn by the man holding the gun. They then began a systematic search and noted that cer- [fol. 178] tain clothing in the room was "along the same description" as given by the victims. Officer Collins, in pulling out the bottom drawer of the bureau, found a gun lying on the floor, together with some bullets wrapped in toilet paper. Following the search they maintained an observation "of the room or in the room" until approximately noon the following day, October 28, but no one arrived except other detectives. Defendant was picked up in Las Vegas about noon on October 29, 1960. The Monrovia officers then departed for Las Vegas. Defendant waived extradition and was returned to Pomona on October 31, 1960.

It is on this testimony that defendant rests his contention that the items found in his room should have been excluded from evidence as having been illegally obtained. His first argument is that the officers had time to procure a search warrant, and their failure to do so made the search illegal. In support of this contention defendant merely points out that the robbery took place on October 25 and the search on October 27. He completely ignores the fact that the interval was used for investigation to pin down defendant as suspect. [1] Furthermore, it is conclusively established in this state that the failure to obtain a warrant, even though there be time to do so, does not make unreasonable an otherwise reasonable search. (*People* v. *Winston*, 46 Cal.2d 151 [293 P.2d 40]; *Lorenzen* v. *Superior Court*, 150 Cal.App.2d 506, 510-511 [310 P.2d 180]; *People* v. *Dominguez*, 144 Cal.App.2d 63, 65 [300 P.2d 194].)

Defendant's second argument is that the search cannot be justified as being incidental to an arrest, although he concedes, *arguendo*, that there was good cause to suspect that defendant was one of the robbers and that the officers "probably" had good cause to suspect that the room

contained evidence. His argument is based on the fact that the clerk told the officers that defendant was not in his room (and therefore they could not have gone to his room to arrest him, but merely to search) and the fact that defendant was arrested approximately 36 hours after the search took place. These arguments are not persuasive.

In *People* v. *Luna*, 155 Cal.App.2d 493 [318 P.2d 116], officers received information from an informant that he had just purchased narcotics from the defendant in the latter's apartment. They went there, knocked on the door and received no response. They forced entry and found narcotics. They waited until defendant returned and took him into custody. The opinion states that in view of the information which the officers had they could reasonably infer that appellant was there and refusing to answer. [fol. 179] Under the circumstances it cannot be contended that a search prior to arrest was other than incidental thereto. At page 495 it was said: "In such cases 'the important considerations are whether the officer had reasonable cause before the search to make an arrest and whether the search and any seizures incident thereto were or were not more extensive that would reasonably be justified as incident to an arrest. . . .' (*People* v. *Simon*, 45 Cal.2d 645, 648 [290 P.2d 531].) '. . . it has been held that it is not significant whether the search precedes or follows the arrest.' (*Id.* p. 648.)"

People v. *Vice*, 147 Cal.App.2d 269 [305 P.2d 270], presents a factual situation somewhat similar to ours. In that case the officers having reasonable cause to make an arrest went to defendant's hotel, knocked on his door and receiving no reply then entered when an employee of the hotel opened the door with a key. Defendant was arrested a half hour later in a different part of town. He was subsequently convicted on the basis of evidence found in his hotel room prior to his arrest. At page 273 the opinion states: "Recent authorities hold that in order for a search and seizure to be valid it is not necessary that the arrest precede the search and seizure. If the search and seizure are part of the same transaction, the search and seizure may occur prior to the arrest." And at page 274: "In the instant case, although the seizure of the nar-

cotics preceded the arrest of the appellant by a half hour or so, nevertheless the arrest and the seizure were part of one single transaction. *Though he was not present in the room at the time the officers arrived they went there for the specific purpose of arresting him.* The finding of the narcotics by the officers after entering the room was not needed in order to make a valid arrest. The arrest was made upon the basis of information supplied by two known, reliable informants, and the arresting process began when the officers first went to the appellant's hotel room. The three officers, Inspectors House, Best and Murphy, were acting together." (Emphasis added.)

In *People* v. *Williams*, 189 Cal.App.2d 29 [11 Cal.Rptr. 43], defendant was convicted of robbery and burglary. The police, having probable cause to make an arrest and search, entered defendant's room in his absence and discovered evidence which was used at the trial. Defendant was not arrested until four hours later when he returned to the apartment. It was held that the search was incidental to the arrest.

In *People* v. *Baca*, 184 Cal.App.2d 693 [7 Cal.Rptr. 864], the officers had reasonable ground to make an ar- [fol. 180] rest and to assume that contraband was on defendant's premises. However, since defendant had been observed leaving his apartment, the officers knew that he was not there. Nevertheless they entered his apartment and obtained evidence that was used at the trial. Defendant was arrested 20 minutes later. At page 699 of the opinion the court said: "Rudy complains that the officers entered and searched his home without a search warrant, prior to his own arrest, and at a time when they knew he was not there. As previously pointed out, it is not significant whether the search precedes or follows the arrest provided they are part of the same transaction. (*People* v. *Vice*, *supra*; *People* v. *Simon*, *supra*.) In such case the important consideration is whether the officer had reasonable cause before the search to make an arrest. (*People* v. *Simon*, *supra*; *People* v. *Luna*, 155 Cal.App.2d 493, 495 [318 P.2d 116].) We have already held that the officers had reasonable cause to arrest both defendants. And it is apparent that the arrests and the search of the prem-

ises were part of the same transaction. The arrest of Rudy was simply a matter of contacting him and this took place about 20 minutes after the entry of the house by the officers. In the *Vice* case, *supra*, the court pointed out (p. 274) that 'although the seizure of the narcotics preceded the arrest of the appellant by a half hour or so, nevertheless the arrest and the seizure were part of one single transaction.'" See also, *People* v. *Dillard*, 168 Cal. App.2d 158 [335 P.2d 702].

[2] In the case at bar it is quite clear that the officers had probable cause to make an arrest and it cannot be reasonably contended that they were required to accept the night clerk's statement that defendant was not in his room. Furthermore, it may be reasonably inferred that they entered his room for the purpose of making an arrest. Having lawfully entered the room the officers observed in plain view a pair of glasses which answered the description of glasses said by the victims to be worn by the robber who had held the gun. This led them to the discovery of other items of evidence in the hotel room. It is not contended that their search was conducted in an unreasonable manner. [3] Furthermore, when investigating officers observe one item in plain sight which gives rise to a legitimate suspicion it is reasonable for them to conduct a further investigation. (*People* v. *Murphy*, 173 Cal.App. 2d 367, 377 [343 P.2d 273].) Moreover, it is quite clear that under the cases discussed above there would be no question about the search being incidental to an arrest if the defendant had returned to his room shortly after the [fol. 181] officers had arrived and they had arrested him there. It would be unsound to hold that defendant, by his action in going to Las Vegas and not returning to his room and making himself available for arrest, could invalidate an otherwise lawful search. The fact that defendant was arrested in a neighboring State, a substantial distance from the point where the search took place, within 36 hours after the officers went to his room, gives rise to a strong inference that the police were quite diligent in their efforts to locate defendant and that the search and arrest were part of the same transaction within the meaning of the above-cited cases.

Defendant also contends that his confession was not voluntary, and therefore, should not have been admitted in evidence. He argues that his confession was the result of the cumulative effect of (1) the fact that he was arrested on October 29 and not arraigned until November 1; (2) a failure to permit defendant to call his wife by telephone; (3) movement from jail to jail; and (4) the confronting of defendant with evidence unlawfully obtained. Obviously item (4) is no longer of concern. Items (1) and (3) fall before testimony of Officer Gilliland that defendant was picked up at noon on the 29th in Las Vegas, the officers went to get him, returned him to Los Angeles County, stopped at the Pomona Police Department at defendant's request so that he might see and talk to his parole officer, and from there took him directly to the Temple City jail where they booked him. This was on October 31, 1960. They did not arrive in Los Angeles County until the afternoon of October 31. Defendant was arraigned on November 1, following his confession, which was given at 10:30 a. m. Officer Gilliland merely asked him if he was involved in the robbery and defendant answered in the affirmative, having been advised by his parole officer to cooperate with the police. Under these circumstances it does not appear that there was any unnecessary delay or that defendant was treated unfairly in any way.

Since all of defendant's assertions respecting promise of reward or benefit were denied by the police witnesses, defendant's contention must rest on the following testimony of Officer Collins: "Q. What about . . . the confession in Temple City; what sort of statements had been made to Mr. Stoner concerning telephone calls and talking to his wife? A. The only statement that I can recall was as we were leaving the Detective Bureau of the Pomona Police Department to put Mr. Stoner in jail to await the arrival of his parole officer. This was in the afternoon of the 31st of October. Mr. Stoner said that he would like to call his [fol. 182] wife. I told him that he could make a telephone call at the Temple Sheriff's Substation after he was booked in, but that I would rather he did not call his wife now. This was at that time because the second party who was involved in the robbery had not been positively identified

and his whereabouts was unknown to me then. THE COURT: Did you tell him that? THE WITNESS: Yes, sir. THE COURT: All right. THE WITNESS: And that I would rather that he did not. But if he insisted, he could make a phone call when he was booked into the Temple City Sheriff's Substation. Q. By MR. TAYLOR: Did you ever tell Mr. Stoner that unless he confessed to you, you would not let him telephone his wife? A. No, sir. Q. Did you condition his confession on seeing his wife? A. No, sir."

[4] Although it is true that the choice between conflicting evidence on the subject of voluntariness is the province of the trial court, where evidence is uncontradicted the appellate tribunal must accept it as true and make its own determination as to whether a confession was coerced. (*People* v. *Baldwin*, 42 Cal.2d 858, 867 [270 P.2d 1028]; *People* v. *Millum*, 42 Cal.2d 524, 527 [267 P.2d 1039]; *People* v. *Speaks*, 156 Cal.App.2d 25, 36 [319 P.2d 709]; *People* v. *Lindsey*, 188 Cal.App.2d 471, 478-479 [10 Cal. Rptr. 488]; *People* v. *Trout*, 54 Cal.2d 576, 583 [6 Cal. Rptr. 759, 354 P.2d 231]; *People* v. *Berve*, 51 Cal.2d 286, 290 [332 P.2d 97].) If it be said to be inferable that Officer Collins' statement had the effect of coercion rather than persuasion, defendant certainly could not have been coerced to do more than wait until he had been booked before he made a telephone call. It strains one's credulity to suggest that defendant would involuntarily confess to a crime merely because he was required to wait before making a telephone call.

People v. *Kendrick*, 56 Cal.2d 71, 85 [14 Cal.Rptr. 18, 363 P.2d 13]: "We take up separately the more important facts relied upon by defendant: The fact that defendant was not taken before a magistrate within the time required by the statute has been held by this court [citations] and by the Supreme Court of the United States [citation] not to render a confession involuntary as a matter of law. It is only one of the relevant circumstances to be considered in determining the question of voluntariness. [Citation.]

"The failure to allow defendant to consult counsel during or prior to his interrogation has also been held not to render a confession involuntary as a matter of law. [Citations.]

"We must therefore look to the other facts surrounding [fol. 183] the defendant's interrogation which led to his confessions to determine whether they, giving proper weight to the two facts previously discussed, were such as to compel the conclusion that the confessions were involuntary."

And page 86: "The conclusion of the trial court with respect to the voluntary character of a confession will not be disturbed on appeal in the absence of a clear abuse of discretion.

In referring to section 851.5 of the Penal Code, on which defendant relies, the opinion in *In re Newbern*, 55 Cal.2d 500 [11 Cal.Rptr. 547, 360 P.2d 43] at page 507, states: "In view of the foregoing we must conclude herein that petitioner was improperly denied the right to call a bail bondsman. But, as stated, there is no relief to which the petitioner is now entitled. There is no sufficient showing in this case that the denial of the right to call a bail bondsman resulted in the denial of a fair trial or prevented the petitioner from obtaining and presenting evidence of his innocence of the charges, as in the case of the denial of the right to call a physician for a blood sample. (*In re Newbern*, *supra*, 175 Cal.App.2d 862 [1 Cal. Rptr. 80].) Nor are we concerned here with an irregularity in commitment, which requires the setting aside of the complaint. (*People* v. *Elliot*, 54 Cal.2d 498 [6 Cal.Rptr. 753, 354 P.2d 225].) It is manifest, however, that if the mandatory statute (Pen. Code, § 851.5) is to be meaningful, some standard of enforcement is necessary apart from a showing of a continuing prejudice suffered by an accused. The Legislature has provided for this in subdivision (b), as follows: 'Any public officer or employee who deprives an arrested person of the rights granted by this section is guilty of a misdemeanor.' This, obviously, provides some deterrent to insure compliance with the statute as now interpreted by the courts."

Judgment and order denying motion for new trial affirmed.

Fox, P. J., and Herndon, J., concurred.

[Clerk's Certificate to foregoing paper omitted in printing.]

[fol. 184]

ORDER DUE
August 24, 1962

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA IN BANK

2nd District, Division 2, Crim. No. 7753

[File Endorsement Omitted]

PEOPLE

v.

STONER

ORDER DENYING HEARING AFTER JUDGMENT BY DISTRICT COURT OF APPEAL—filed August 22, 1962

Appellant's petition for hearing DENIED.

* * * *

/s/ [illegible]
Chief Justice

[Clerk's Certificate to foregoing paper omitted in printing.]

[fol. 185]

SUPREME COURT OF THE UNITED STATES

No. 746 Misc., October Term, 1962

JOSEPH LYLE STONER, PETITIONER

vs.

CALIFORNIA

On petition for writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—June 17, 1963

On consideration of the motion for leave to proceed *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. Review is limited to the question of whether evidence was admitted which had been obtained by an unlawful search and seizure. The case is transferred to the appellate docket as No. 1181 and placed on the summary calendar.

U. S. GOVERNMENT PRINTING OFFICE: 1963 706066 234

IN THE

Supreme Court of the United States

October Term, 1963
No. 209

JOSEPH LYLE STONER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

On Writ of Certiorari to the District Court of Appeal of California, Second Appellate District.

Brief Amicus Curiae of the American Civil Liberties Union of Southern California.

A. L. WIRIN,
FRED OKRAND,
257 South Spring Street,
Los Angeles 12, California,

PAUL COOKSEY,
9617 Lakewood Boulevard,
Downey, California,
Attorneys for Amicus Curiae.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

TABLE OF AUTHORITIES CITES

IN THE

Supreme Court of the United States

October Term, 1963
No. 209

JOSEPH LYLE STONER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

On Writ of Certiorari to the District Court of Appeal of California, Second Appellate District.

Brief Amicus Curiae of the American Civil Liberties Union of Southern California.

Interest of Amicus Curiae.

The American Civil Liberties Union of Southern California is submitting this brief with the consent of both parties filed herewith with the Clerk of this Court. Amicus is a nonpartisan organization dedicated to the preservation of American Constitutional Civil Liberties. Its interest in the present case arises from its belief that the rights guaranteed by the Fourth and Fourteenth Amendment against unreasonable search and seizure have been breached.

Statement.

On October 25, 1960, the Budget Town Food Market in Monrovia, California, was robbed by a man holding a gun, wearing horn-rimmed glasses and a gray coat or jacket. [R. 16, 21, 22, 25, 29, 30.]

Sometime shortly after the robbery, a checkbook identified as belonging to someone with a name similar to defendant's was found in the parking lot of the grocery store by a Mrs. Franklin which was turned over to the investigating officers who used this to locate the residence of defendant in the Mayfair Hotel in Pomona. [R. 69, 70.] The officers also ascertainted that a man with that name (Joey L. Stoner) had been previously convicted of felonies. [R. 70.]

On October 27, investigating officers went to the Mayfair Hotel in Pomona without a search or an arrest warrant. [R. 67.]

They approached the night clerk and asked him if there was a party by the name of Joey L. Stoner, living in the hotel. [R. 71.] The clerk checked his records, said yes, gave them the room number, but stated that the occupant was out of his room at that time. [R. 71.] They asked the night clerk if he would give them permission to enter the room, and told the clerk that they were there to make an arrest of a man who had possibly committed a robbery, and they were concerned about the fact that he had a weapon. The night clerk took them to petitioner's room, unlocked the door, and invited them to enter. [R. 71, 72.]

They entered the room, seized a pair of horn-rimmed glasses, systematically searched the room, including the

bureau drawers, and located a gray jacket, a gun, cartridges and clip. [R. 72, 73.]

The investigating officers *then* determined that this petitioner was their suspect [R. 74], and observed or stayed in the room until approximately noon of the following day, October 28th. [R. 74.]

Petitioner was arrested in Las Vegas, Nevada, on October 29, 1960, and brought to California. [R. 79.] Upon being interrogated in California, he was confronted with the gun which had been seized [R. 93, 94] and made a statement at that time which, if true, admitted that he had committed the robbery. [R. 94.]

Upon the trial, the gun, the glasses, the jacket or coat, the cartridges and the clip were received in evidence over petitioner's objection that they were seized as the result of an unlawful search and seizure. [R. 75.]

Summary of Argument.

The search of petitioner's room in his absence constituted an illegal search and seizure in violation of the Fourth and Fourteenth Amendments.

State police officers must meet constitutional standards in their searches and seizures and evidence obtained through an illegal search and seizure is inadmissible.

ARGUMENT.

I.

The Search of Petitioner's Room in His Absence Was Without His Consent, Without a Search Warrant, Cannot Be Considered as a Search Incident to His Arrest, and Is Therefore an Illegal Search and Seizure.

A.

The record is absolutely clear that the search of petitioner's room was made without a warrant of any kind. [R. 67.]

Equally clear, we believe, is that the consent of the hotel clerk cannot be substituted for the consent of the tenant of the room. *Chapman v. United States,* 365 U. S. 610; *Johnson v. United States,* 333 U. S. 10; *Mosco v. United States,* 301 F. 2d 180 (C. A. 9, 1962).

B.

Not in question also, is the proposition that a man's home cannot be searched without a search warrant except as an incident to a lawful arrest therein. Had Stoner first been arrested in Las Vegas, Nevada, and then his room in Pomona, California, searched, such a search would have been illegal. *Harris v. United States,* 331 U. S. 145; *Gouled v. United States,* 255 U. S. 298; *Agnello v. United States,* 269 U. S. 20; *Page v. United States,* 282 F. 2d 807 (C. A. 8, 1960).

Appropriate here is the language in the *Agnello* case which discussed the situation where an arrest was made in one place followed by a search a few blocks away.

"The right without a search warrant contemporaneously to search persons lawfully arrested

while committing crime, and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits, or as the means by which it was committed, as well as weapons and other things to effect an escape from custody is not to be doubted. . . . The legality of the arrests, or of the searches and seizures made at the home of Alba, is not questioned. Such searches and seizures naturally and usually appertain to and attend such arrests. But the right does not extend to other places. Frank Agnello's house was several blocks distant from Alba's house, where the arrest was made. When it was entered and searched, the conspiracy was ended and the defendants were under arrest and in custody elsewhere. That search cannot be sustained as an incident of the arrest." (269 U. S. at 30-31).

C.

The only support for this search and seizure rests upon the circular California proposition that a search may precede an arrest because the search and the arrest are considered as one transaction, and the search is then considered to be an incident to the arrest.

To say that an arrest 36 hours after the search in another state relates back to the time of the search itself, is to invalidate the meaning of time itself and to strain the order of things. This is equivalent to calling a prologue an epilogue. We think this tortures the "same transaction" phrase and drags the search into legality by the hair.

The Federal Courts have considered this California proposition on at least two other occasions and found

it each time to violate the Fourth and Fourteenth Amendments.

The Ninth Circuit Court of Appeals considered this exact question on almost identical facts in *Mosco v. United States*, 301 F. 2d 180 (1962). The police officers went to Mosco's apartment to arrest him. They knocked on the door, received no answer, looked through a window and did not see him, so they entered the apartment with the aid and consent of the landlord and searched the premises. A half hour later, Mosco appeared at the apartment and was then arrested. In discussing this situation, the Court stated (p. 187):

> "The exception which permits a search to be made without a warrant, if incident to a lawful arrest, is based upon necessity. Arresting officers must be able to protect themselves, to deprive prisoners of potential means of escape, and to avoid destruction of evidence by the arrested person. . . . This rule of necessity obviously has no application if the arrest has not been made and cannot be made. No search under these circumstances could be made for the purpose of protecting officers and making an arrest, depriving an arrested person of potential means of escape, or avoiding destruction of evidence by the arrested person. It follows that a search made prior to an arrest and at a time when the officers were physically unable to make an arrest cannot be regarded as 'incident' to an arrest, within the meaning of the rule. . . . If it turned out that Mosco was arrested somewhere else, or arrested at his apartment the following week, it could not have been said

that the search which uncovered Exhibit C was incident to the arrest. This being true, it seems clear that the officers were without authority at the time of the search, but seek to cloak the search with purported authority which, as a matter of pure coincidence, attached later when Mosco reappeared at his apartment."

Hurst v. California, 211 F. Supp. 387 (ND Cal. 1962), dealt squarely with the problem of a search which preceded the arrest of people who were then in the house. That case held that Constitutional law on search and seizure requires (p. 392):

> "that an arrest be made *prior* (emphasis not supplied) to any search of a defendant or of the area under his possession or control, in order that such search be considered as incident to the arrest (cases cited). The California rule, on the other hand, appears to sanction searches as incident to arrest, even if the search occurs prior to the actual arrest, as long as there was, in fact, probable cause to have made an arrest prior to the making of the search. (Citations.) The logic and language of *Mapp* and *Elkins, supra,* do not, in my opinion, permit the continuation of this California rule. Although the California Courts have reached an opposite conclusion (citations), I find it impossible to rationalize the use of two conflicting types of search incident to an arrest, . . . I see no legal basis for permitting a search, as incidental to an arrest, to precede that arrest, no matter how appealing the practicalities of the situation might appear."

D.

Some mention is appropriate here concerning the exploratory nature of the search of Stoner's room. In *Boyd v. United States*, 116 U. S. 616, this Court reviewed the history, leading to the adoption of othe Fourth Amendment and to the vices of the General Warrant. In the concurring opinion in that case it was also pointed out that (20 L. ed. at 755):

> "It is only unreasonable searches and seizures that are forbidden, and the means of securing this protection was by abolishing searches under warrants, which were called general warrants, because they authorized searches in any place, for anything. This was forbidden, while searches founded on affidavits, and made under warrants which described the thing to be searched for, the person and place to be searched, are still permitted."

General searches were again condemned in *United States v. Lefkowitz*, 285 U. S. 452, in *Gouled v. United States*, 255 U. S. 298, in *Agnello v. United States*, 269 U. S. 20, and in *Go-Bart Importing Company v. United States*, 282 U. S. 344.

As these cases are applied to the instant facts, it seems clear that the search for and seizure of the glasses, which in turn led to the search for and seizure of the jacket and gun cannot be sustained. As this Court has repeatedly pointed out (*e.g. Harris v. United States*, 331 U. S. 145, 154; *United States v. Rabinowitz*, 339 U. S. 56, 64, f.n. 6; *Lefkowitz* (*supra*, pp. 464, 666); *Gouled* (*supra*, pp. 309-311)) the glasses and jacket were merely evidentiary materials which may not be sezied nor taken into custody, even under the authority of a search warrant or during the course of a search incident to an arrest.

II.

State Police Officers Must Meet Constitutional Standards in Their Searches and Seizures, and Evidence Obtained Through an Illegal Search and Seizure Is Inadmissible in State Courts.

This proposition is no longer open to question. *Mapp v. Ohio,* 367 U. S. 643; *Ker v. California,* 374 U. S. 23.

We think it appropriate here to mention something about the significance of the seizure of these objects and the conviction of petitioner. The officers, when interrogating petitioner after his arrest, confronted him with this gun, at which time he made his admission of guilt. The witnesses, Mr. Greeley and Mrs. Ray, devoted substantial testimony to identification of the glasses, the jacket or coat, and the gun which were seized in petitioner's room. [*E.g.* R. 17, 26, 29, 30, 61.] It thus appears that the entire proceedings against petitioner are tainted with the illegal search and seizure. Therefore the evidence must be excluded and the conviction reversed. *Silverthorne Lumber Co. v. United States,* 251 U. S. 385, 392; *Wong Sun v. United States,* 371 U. S. 471, 484–487.

Conclusion.

In our view, if one's home may be searched in one's absence, without a search warrant, with or without probable cause for one's arrest, then much of the Fourth Amendment of the Constitution becomes almost meaningless. When we attempt to squeeze the search and the arrest together in one package and label it as the same transaction, then we play fast and loose with our Constitutional rights and erode them

for all citizens for the sake of convicting one. We think this price is too high.

Because of this we urge the Court to hold that the evidence obtained here is evidence obtained through an unconstitutional search and seizure; as such, it is inadmissible; and, therefore, the conviction of this petitioner must be set aside.

Respectfully submitted,

A. L. WIRIN,
FRED OKRAND,
PAUL COOKSEY,
Attorneys for Amicus Curiae.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 209

JOSEPH LYLE STONER,

Petitioner,

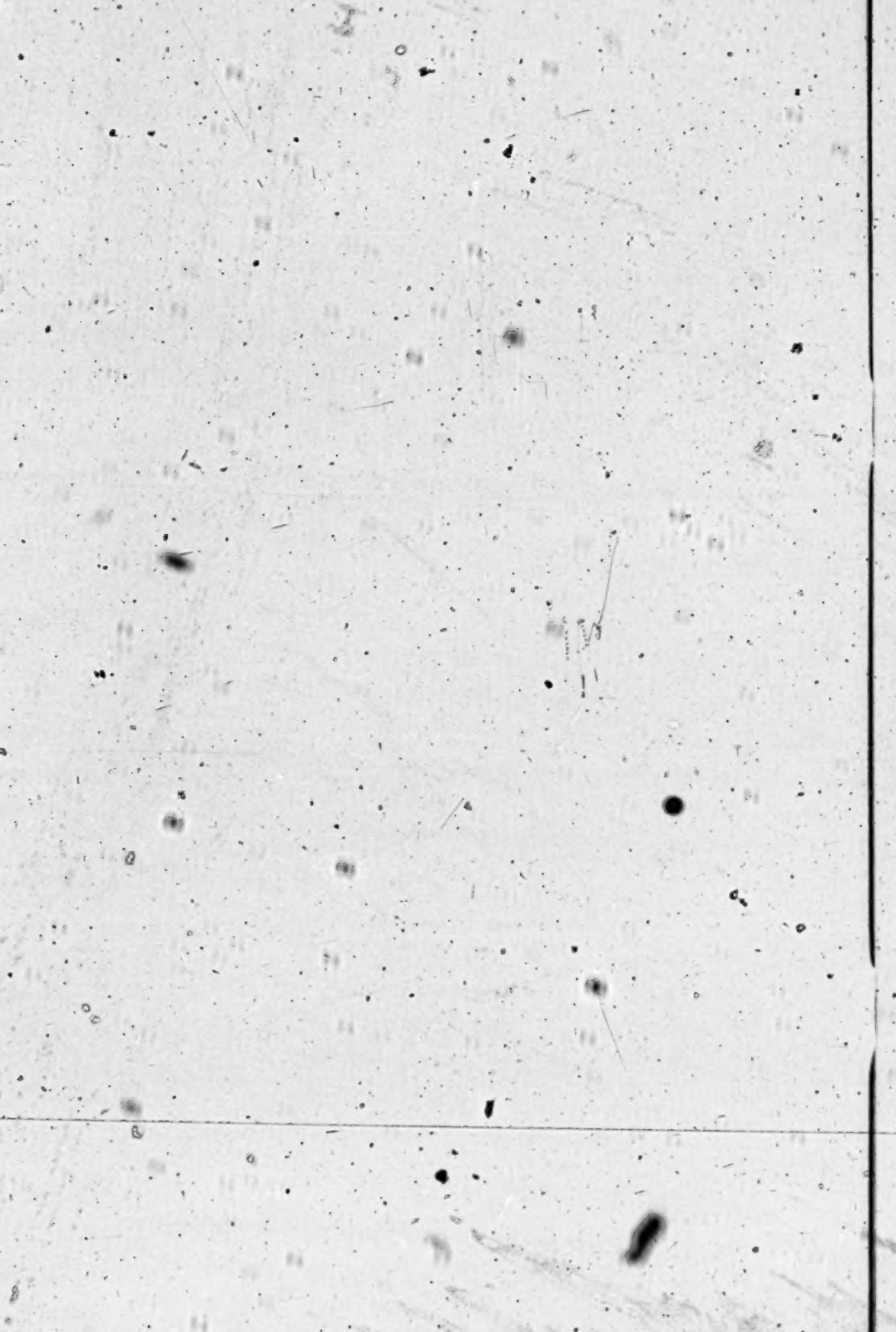
v.

CALIFORNIA,

Respondent.

BRIEF FOR PETITIONER

WILLIAM H. DEMPSEY, JR.
734 15th Street, N. W.
Washington, D. C.
Attorney for Petitioner
(Appointed by this Court)



INDEX

SUBJECT INDEX

Citations

CASES:

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 209

JOSEPH LYLE STONER,

Petitioner,

v.

CALIFORNIA,

Respondent.

BRIEF FOR PETITIONER

Opinions Below

The opinion of the District Court of Appeal of the State of California is reported at 205 Cal. App. 2d 108, 22 Cal. Rptr. 718 (R. 121). The order of the Supreme Court of California denying hearing is not officially reported. It appears in the Transcript of Record at page 130.

Jurisdiction

The order of the Supreme Court of California was entered on August 22, 1962 (R. 130). The jurisdiction of this Court rests upon 28 U.S.C. 1257(3). The petition for a writ of certiorari was granted on June 17, 1963. 374 U.S. 826.

Question Presented

Whether, under the Fourteenth Amendment to the United States Constitution, certain evidence should have been excluded in the state criminal proceeding against petitioner, where that evidence was seized by state officers after an unauthorized entry into petitioner's locked hotel room without search or arrest warrant and without any apparent reason for not securing a warrant, where petitioner was not present, where no crime was being committed in the room at the time, where petitioner was not arrested until some 37 hours thereafter in another state, and where some of the evidence was neither contraband nor the fruits of crime nor the means or instrumentalities of committing crime.

Constitutional Provisions Involved

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Section one of the Fourteenth Amendment to the Constitution of the United States provides:

> "All persons born or naturalized in the United States, are subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law

which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement

At issue in this case is the constitutionality of a search and seizure by state police officers. More particularly, the question is whether the search and seizure, though without validation of warrant, can nonetheless be justified under the Fourteenth Amendment to the United States Constitution as incident to an arrest. The circumstances relevant to this question are as follows:

Petitioner was tried in the Superior Court of California for the County of Los Angeles on a charge of armed robbery, a violation of sections 211 and 211a of the California Penal Code (R. 1). At the trial, the prosecution relied upon the testimony of two eyewitnesses to the crime, an alleged accomplice, and two police officers. The eyewitnesses—David Greely and Donna May Ray—were employed in the Budget Town Market in Monrovia, California, the site of the robbery, and were working there on October 25, 1960, the night of the crime (R. 16, 27). They testified that, at about 8 o'clock that evening, the store had been robbed by two men, one of whom had a gun. Both identified petitioner as the robber with the gun, and Mr. Greely identified the second man as one Peter Schales, the third government witness. (Mrs. Ray could not identify the second man.) (R. 16-19, 27-29.)

In the course of the examination of both Mr. Greely and Mrs. Ray, the prosecution buttressed the identification testimony by use of certain items, most of which, as the testi-

mony of the police officers subsequently established, had been taken by the police from petitioner's hotel room. Thus, Mr. Greely testified that a gun showed to him by the prosecutor appeared to be the weapon that had been used by petitioner, and that a gray hat, a pair of horn-rimmed glasses, and a gray jacket looked like the hat, glasses and jacket worn by petitioner at the time of the crime (R. 17, 25-26, 61). Mrs. Ray's testimony was substantially the same (R. 29-30, 32-34, 39-40).

These same items were used in similar fashion by the prosecutor during the interrogation of the alleged accomplice, Peter Schales. Schales testified that he and petitioner had committed the crime; that the gun showed to him by the prosecutor appeared to be the weapon used by petitioner during the robbery; and that the hat and glasses (although not the jacket) showed to him by the prosecutor appeared to be the hat and glasses worn by petitioner on the night of the crime (R. 43-48).

The last two prosecution witnesses were detectives Charles Gilliland and Frederick Collins of the Monrovia police force. Over objection, they were permitted to furnish testimony that was critically important in two respects: First, their testimony established that the gun, the jacket, and the glasses (although not the hat) which had been identified by the preceding witnesses, together with cartridges for the gun, had been taken by them and another officer from petitioner's hotel room (R. 66, 76, 98-99). Second, Gilliland testified that petitioner had confessed to the crime and had admitted using the gun (R. 93-94).[1]

---

[1] Defense counsel contended that the confession, which had been obtained after about 3 days of custody prior to a hearing before a magistrate, during which time petitioner saw no friends, relatives, or lawyers, had been involuntary. This issue was excluded from review by this Court. 374 U.S. 826.

Petitioner's defense consisted principally of testimony by two witnesses that he had been with them at the time of the crime.[2] In addition, petitioner's counsel attempted to undermine the prosecution's case by attacking the credibility of Schales on the theory that he had implicated petitioner in return for a light sentence.[3]

Thus it is apparent that the conviction rested upon a resolution of the issue of credibility by the jury against petitioner's witnesses and in favor of the state's, and it is also apparent that the evidence seized from petitioner's hotel room probably had a considerable influence upon the jury. It is the testimony concerning the search for and seizure of this evidence with which we are particularly concerned.

Upon petitioner's objection to introduction in evidence of the gun, cartridges, jacket, and glasses, and to introduction of testimony by the detectives concerning them, the court took testimony from detective Gilliland on *voir dire* outside the presence of the jury. This testimony, together with testimony by both Gilliland and detective Collins before the jury after the exhibits were admitted, established the following facts:

Shortly after the robbery, the manager of the Budget Town Market turned over to Gilliland a check book and

---

[2] Petitioner did not take the stand. It may be noted in this connection that he was charged with two prior felony convictions and was sentenced as an habitual criminal (R. 2, 120).

[3] On cross-examination, Schales admitted that he had already pleaded guilty to the robbery and had been given only a one year county jail sentence, and also admitted that he had told petitioner, "If I don't involve you in this, if I don't testify, things are going to go rough for me." However, he maintained that, while he had asked the police about a sentence recommendation, he had never been promised leniency; and, so far as his statement to petitioner was concerned, he testified: "I'm trying to do what is right. And that's what I meant when I told him that" (R. 49, 51, 55, 59-60).

deposit book that had been found in the store's parking lot. Petitioner's name appeared in the deposit book, and Gilliland learned through the Bank of America that the check book was also registered to petitioner (R. 69).

Stubs in the check book indicated that two checks had been drawn several days before the robbery to the Mayfair Hotel in Pomona, California, one of them for rent. Mr. Gilliland thereupon inquired of the police department in Pomona whether a Joey L. Stoner had a police record, and discovered that a person of that name had been convicted of robbery and murder. Next, Gilliland obtained a photograph of Joey L. Stoner from the Pomona police and showed it to the two eyewitnesses, Mr. Greely and Mrs. Ray. "They both stated that this looked like the man who held the gun, however, they would like to see him in person" (R. 70-71).

At about 10 o'clock on the evening of October 27, 1960,[4] two days after the robbery, detectives Gilliland and Collins went to Pomona and conferred with the Pomona police. Two members of the Pomona force thereupon accompanied Gilliland and Collins to the Mayfair Hotel. Gilliland described the subsequent events as follows:

> "... We approached the desk, the night clerk, and asked him if there was a party by the name of Joey L. Stoner living at the hotel. He checked his records and stated, 'Yes, there is.' And we asked him what room he was in. He stated he was in Room 404 but he was out at this time.
>
> "We asked him how he knew that he was out. He stated that the hotel regulations required that the key to the room would be placed in the mail box each time

[4] "... [T]he unannounced entry of the Ker apartment occurred after dark, and such timing appears to be common police practice, at least in California." *Ker* v. *California*, 374 U.S. 23, 52 (1963) (opinion of Brennan, J.).

they left the hotel. The key was in the mail box, that he therefore knew he was out of the room.

"We asked him if he would give us permission to enter the room, explaining our reasons for this.

"Q. What reasons did you explain to the clerk?

"A. We explained that we were there to make an arrest of a man who had possibly committed a robbery in the City of Monrovia, and that we were concerned about the fact that he had a weapon. He stated, 'In this case, I will be more than happy to give you permission and I will take you directly to the room.'

. . . . . .

"We left one detective in the lobby, and Detective Oliver, Officer Collins, and myself, along with the night clerk, got on the elevator and proceeded to the fourth floor, and went to Room 404. The night clerk placed a key in the lock, unlocked the door, and says, 'Be my guest.'

"Q. What did you do?

"A. We entered the room, and the first thing that was observed was a pair of horn-rimmed glasses laying on a desk in the northeast corner of the room. I picked the glasses up and looked at them and noted that they answered the description of the glasses described by one of the victims.[8]

---

[8] The description given to the police by Mr. Greely after the crime had been as follows: "I described him as 35 to 40 years old, I believe, five-ten, wearing a gray shirt, gray sweater and a gray hat, swarthy complexion. . . . Wearing glasses, excuse me; wearing horn-rimmed glasses" (R. 21).

Mrs. Ray stated: "I described him as wearing a gray jacket and hat and glasses, and I couldn't see his hair, and I couldn't see his eyebrows very well; and I said possibly I could see a moustache, the way the lights were shining on it" (R. 34).

Sometime during the period of investigation, the police asked Mrs. Ray and Mr. Greely to attempt to identify four persons that were brought by the police to the store, but they were unable to do so (R. 35).

"Q. I'm going to show you . . . People's Exhibit 3 for identification.

"A. Yes, sir, that's the glasses.

"Q. Are these the glasses that you observed in the room?

"A. Yes, sir.

"Q. Did you attach any significance to the fact that these glasses—the fact of these glasses being in the room?

"A. Well, the fact that they were horn-rimmed glasses.

"Q. Had you received some sort of report from some person about horn-rimmed glasses?

"A. Yes, one of the victims in the robbery had stated that the suspect who had the gun in his hand also wore horn-rimmed glasses.

"Q. What else did you do?

"A. Then began a systematic search of the room and noted that certain clothing in the room was along the same description as given by the victim or the victims; and during the check of the bureau, Officer Collins pulled the drawers from the bureau to check them. The bottom drawer, when he pulled it completely out we observed a gun lying on the floor, which is the gun which is now—

"Q. Is that People's Exhibit 1?

"A. People's Exhibit 1, I believe. And alongside of this gun was a—some toilet paper, white toilet paper which we unwrapped and it showed a number of cartridges for a .45 automatic.

. . . . . .

"Q. Was there anything else discovered in the room?

"A. There was certain address books and other miscellaneous evidence that was obtained, yes.

. . . . . .

"Q. Now, with reference to . . . . the coat, People's Exhibit 4 for identification; did you recover that from the room?

"A. It was taken from the room, yes.

"Q. What else occurred after the search?

"A. Well, at this time we determined that this would be the suspect in our particular robbery and we maintained an observation of the room or in the room, my partner and myself, until approximately noon the following day, which was the 28th of October" (R. 71-74).

Thus the officers, who had arrived at about 11 p.m. on the 27th of October, remained until about noon the next day; but petitioner did not return to the hotel and consequently they left (R. 74, 76).

Petitioner was arrested at about noon on October 29th—37 hours after the search of his hotel room—in Las Vegas, Nevada. While it is not clear who apprehended him, it was not Gilliland (R. 79, 94). It appears that Gilliland and Collins went to Las Vegas after petitioner was arrested and brought him back to California (R. 77, 79, 82).

In sum, without a search or arrest warrant, the officers entered petitioner's locked room in his absence and without his permission, conducted a "systematic search" down to the pulling out of bureau drawers, seized incriminating evidence, and thereupon "determined that this would be the suspect." Petitioner was arrested 37 hours later in another state. Despite petitioner's vigorous objection that the search and seizure had been unlawful (R. 66, 75), the trial judge ruled—without explanation—that they had not been, and consequently admitted into evidence the gun, the glasses, the jacket, and the cartridges and clip, and permitted the officers to testify before the jury as to where these items had been found (R. 75-76, 98).

On appeal to the District Court of Appeal of California, the judgment of conviction was affirmed. 205 Cal. App. 2d 108 (R. 121). As to the issue at hand, the court held that the search and seizure were lawful because incident to a valid arrest. The court reasoned that the officers had had probable cause to arrest petitioner prior to their entry into the hotel room; that they were not obliged to accept as true the clerk's statement that petitioner was not in his room; that "it may be reasonably inferred that they entered his room for the purpose of making an arrest"; that their observation of the glasses in plain sight reasonably led them to a further search; and that in the circumstances the arrest and the search and seizure were "part of the same transaction." The court concluded:

> "'. . . Moreover, it is quite clear that under the cases discussed above [all state cases] there would be no question about the search being incidental to an arrest if the defendant had returned to his room shortly after the officers had arrived and they had arrested him there. It would be unsound to hold that defendant, by his action in going to Las Vegas and not returning to his room and making himself available for arrest, could invalidate an otherwise lawful search. . . .'" *Id.*, at 113.

The Supreme Court of California refused to review the judgment of the District Court of Appeal (R. 130).

This Court granted petitioner's motion for leave to proceed *in forma pauperis*, granted the petition for writ of *certiorari* but limited review "to the question of whether evidence was admitted which had been obtained by an unlawful search and seizure," and appointed counsel (R. 131). 374 U.S. 826; 37– U.S. —— (32 U.S. Law Wk. 3137).

Summary of Argument

1. Under *Mapp* v. *Ohio*, 367 U.S. 643 (1961), and *Ker* v. *California*, 374 U.S. 23 (1963), the sole question is whether the search and seizure met the standards established by the Fourth Amendment, as it has been interpreted by this Court.

2. The search and seizure problems that have provoked controversy in this Court in the past are not involved here. This case may be disposed of under standards firmly established by this Court's prior decisions.

The lower court decision is squarely contrary to *Agnello* v. *United States*, 269 U.S. 20 (1925). There the Court held unconstitutional a search of the suspect's home that was made shortly after the arrest but at a place several blocks removed from the point of arrest. The rule established by *Agnello*—that for a search to be valid as incident to arrest the two events must occur at substantially the same time and in substantially the same place—has never been questioned in this Court and has been followed by the lower federal courts. A search 37 hours before the arrest and in a different state cannot satisfy this requirement.

Moreover, there are additional standards of reasonableness well grounded in this Court's decisions, including *Harris* v. *United States*, 331 U.S. 145 (1947), and *United States* v. *Rabinowitz*, 339 U.S. 56 (1950), which set the outer limits for this type of search and seizure; and the search and seizure in the case at bar do not measure up to any of these standards.

Thus, in the first place, the glasses and jacket that were seized were neither the means or instrumentalities of committing crime, fruits of crime, means for effecting an escape, nor illegally held in any respect. Consequently, they

could not be the subject of a search or a seizure, with or without a warrant. *Boyd* v. *United States,* 116 U.S. 616 (1886); cases cited *infra,* pp. 27-28.

Second, the search became illegal the moment the officers entered the locked room, for they did so without permission, without any warrant, and with no reason to believe petitioner was there or that a crime was being committed in the room. *Morrison* v. *United States,* 262 F.2d 449 (D.C. Cir. 1958); *Raniele* v. *United States,* 35 F.2d 877 (8th Cir. 1929); cases cited *infra* pp. 31-37; cf. *Ker* v. *California,* 374 U.S. 23 (1963).

Third, no crime was committed in the officers' presence at the time of arrest, and many decisions, including *Harris* (331 U.S., at 155) and *Rabinowitz* (339 U.S., at 66), indicate this circumstance is significant in assessing the legality of a search incident to arrest.

Fourth, there is no showing that the officers did not have time to get warrants, and this factor, while not controlling, is relevant even after *Rabinowitz. Rent* v. *United States,* 209 F.2d 893, 899 (5th Cir. 1954).

Fifth, there is not sufficient support in the record for the view that the officers intended to arrest rather than to search when they entered the room. While they may have had probable cause to arrest and while they told the room clerk they intended to arrest, at the same time they did not get an arrest warrant and Gilliland testified that they determined petitioner was the suspect *after* the search. The ambiguity should be resolved against the state, since it carries the burden of justifying the exemption from the warrant requirement. *United States* v. *Jeffers,* 342 U.S. 48, 51 (1951). And if the purpose was to search, the search and seizure without a warrant were illegal under well-established principles. *United States* v. *Jeffers, supra;*

Taylor v. *United States*, 286 U.S. 1 (1932); *Johnson* v. *United States*, 333 U.S. 10 (1948); *Chapman* v. *United States*, 365 U.S. 610 (1961); *Jones* v. *United States*, 357 U.S. 493 (1958).

3. While the case may be disposed of upon the basis of this Court's prior decisions without impairing the authority of any of them, we respectfully suggest that the Court consider whether the most appropriate method of resolving the problems raised in this case might not be the overruling of *Harris* and *Rabinowitz*. As to the merits of those decisions, we rely upon the arguments advanced in the dissenting opinions; and as to the wisdom of overruling them, we rely upon the case at bar as a demonstration of their unfortunate consequences in the lower courts.

ARGUMENT

I.

Introductory Comments.

It is now settled that under *Mapp* v. *Ohio*, 367 U.S. 643 (1961), the state courts are obliged by the Fourteenth Amendment to the Constitution of the United States to exclude in criminal trials any evidence that has been secured in violation of the standards of the Fourth Amendment. *Ker* v. *California*, 374 U.S. 23 (1963). In consequence, the issue raised in this case must be disposed of by application of the decisions of this Court dealing with the legality under the Fourth Amendment of searches and seizures in the absence of a warrant.*

* It perhaps should be noted specifically that this case raises no problem of retroactive application of *Mapp*. In the first place, the case is here on direct review, so that enforcement of the exclusionary rule could not be more retroactive than in *Mapp* itself. Moreover, while the trial in the case was held before the decision

While the rule of *Mapp* and *Ker* avoids the necessity of elaboration of a new body of constitutional search and seizure law to be applied to the states by way of the exclusionary rule, two broad problems remain. The first, which is unique to state proceedings, is that the Court in *Ker* made it plain that federal court decisions grounded upon rules of evidence rather than upon the command of the Fourth Amendment are not to be the basis for excluding evidence in state courts. However, while in some areas it may prove difficult to differentiate between the constitutional and the non-constitutional bases of prior decisions, in the case at bar our argument is grounded wholly upon precedent which is unquestionably constitutional in derivation.

The second problem, which is not unique to state court proceedings but which since *Mapp* is raised in that context for the first time, is that the prior decisions of this Court relating to the Fourth Amendment do not fall into a clear pattern. And this is especially true of the cases involving the right of law enforcement officers to search and seize incident to arrests. As the Court itself has noted, "[T]he

---

in *Mapp*, the District Court of Appeal decision of June 26, 1962 (R. 121), came a full year after *Mapp*. Thus the situation is precisely the same as it was in *Ker*. See lower court opinion in *Ker*, 195 Cal. App. 2d 246, 15 Cal. Rptr. 767 (Aug. 29, 1961), and trial court judgment, set forth in Record in this Court, p. 9 (Dec. 9, 1960). It may also be observed that even at the time of the trial the judge was required to consider the reasonableness of the search under both state and federal constitutions because of the California exclusionary rule. *People* v. *Cahan*, 44 Cal. 2d 434, 282 P.2d 905 (1955). And there was no indication by the trial court that in its view the federal decisions relevant to the issue here raised involved the type of "needless refinements and distinctions" which under *Cahan* did not have to be enforced by way of exclusion of evidence. *Id.*, at 450, 282 P.2d, at 915.

As a point of interest, though not of relevance, it may be noted that Article I, section 19 of the California Constitution is identical to the Fourth Amendment.

cases in this Court dealing with the extent of the search which may properly be made without a warrant following a lawful arrest for crime . . . cannot be satisfactorily reconciled." *Abel* v. *United States*, 362 U.S. 217, 235 (1960). As we shall demonstrate, however, disposition of the issue raised in this case does not require any such reconciliation, for the search and seizure here involved violated Fourth Amendment requirements whether measured by the more permissive or the more restrictive of this Court's decisions.

II.

The Search and Seizure Were Invalid Under Standards Firmly Established by Prior Decisions of This Court.

A. *Background of the "Incident to Arrest" Doctrine.*

Both because this case can be dealt with on the basis of principles which run through every search and seizure case ever decided by this Court, and also because the Court is thoroughly familiar with the evolution of the "search incident to arrest" doctrine, there is no occasion for us to discuss in detail the development of that doctrine. However, because "where one comes out on a case depends on where one goes in," *United States* v. *Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting), a few remarks as to the doctrinal context in which this case arises may be in order.

Three propositions, we take it, have never been challenged in any opinion of this Court and require no citation for support. First, the general rule established by the Fourth Amendment is that the invasion of privacy represented by an official search or seizure should normally be sanctioned by a warrant issued by an independent magistrate who stands between the police and the citizen. Second, that general rule is subject to certain exceptions, one of

which is the right to search and seize incident to a valid arrest. And third, that right extends at least to a search of the person of the accused and things in his immediate physical control.

Disagreement has arisen, however, respecting the scope of the search and seizure that may be permissible beyond the person of the individual arrested. Until the decision in *Harris* v. *United States*, 331 U.S. 145 (1947), the holdings of this Court had sanctioned no such right to search and seize except the right to seize articles in plain sight at the time of arrest and the right, even prior to arrest, to search moving vehicles upon probable cause to believe they contained contraband. See, e.g., *Gouled* v. *United States*, 255 U.S. 298 (1921); *Agnello* v. *United States*, 269 U.S. 20 (1925); *Carroll* v. *United States*, 267 U.S. 132 (1925); *Go-Bart Co.* v. *United States*, 282 U.S. 344 (1931); *United States* v. *Lefkowitz*, 285 U.S. 452 (1932); but cf. *Agnello* v. *United States*, *supra*, at 30 (*dictum*); *Marron* v. *United States*, 275 U.S. 192 (1927) (explained in *Go-Bart Co.* v. *United States*, *supra*, at 358, and in *United States* v. *Lefkowitz*, *supra*, at 465).

In *Harris*, however, the Court, in a 5-4 decision, held that a warrant-less search of a four-room apartment immediately after arrest was within the incident to arrest exception; and this holding was reaffirmed by a 5-3 decision in *United States* v. *Rabinowitz*, 339 U.S. 56 (1950).

Thus, accepting the continued validity of *Harris* and *Rabinowitz* for present purposes (about which we shall say more later), the question is whether the search in the case at bar falls within the exception recognized by those decisions.

B. *Theory of the State Court Decision.*

While certain factual inferences drawn by the state appellate court are most doubtful, granting for the moment their correctness, the theory of the decision, conservatively stated, comes to this: If police officers have probable cause to arrest and actually set out to arrest rather than to secure evidence, they are at liberty, though without any warrant, to enter the suspect's locked home; and even though he is absent, they are nonetheless free to search the premises thoroughly to uncover evidence of his guilt and to seize it once it is found. Nor does it matter that he is not arrested for days or that he is arrested hundreds of miles away, as long as it was possible at the time of the search that he would return shortly and be arrested in his home.

This decision is but one step removed from the total obliteration of the safeguards of the Fourth Amendment. In place of the requirement that the intrusion into the home be sanctioned by a magistrate upon a sworn showing that there is good reason to believe that particular property is in a particular place and that the state has the right to seize it, there is only the requirement that the police officer have probable cause to arrest. This alone authorizes him to break into any place where the suspect may be and to ransack it for evidence of the suspect's guilt. The only barrier left standing is the prohibition against the search that is designed to secure evidence to arrest—a protection of doubtful value, grounded as it is in an appraisal of the motives of the officer.

C. *The State Court Decision Is Contrary to* Agnello v. United States.

Such an effort to expand the "incident to arrest" exception so that it would become the rule was squarely re-

jected by this Court in *Agnello* v. *United States*, 269 U.S. 20 (1925). In *Agnello*, federal officers observed through a window a sale of narcotics and thereupon entered the house and arrested the persons involved. Immediately prior to the offense, the officers had followed one of those arrested from the site of the sale to two other addresses, and it appeared that the narcotics had been secured at one of those places. Consequently, while some agents took those arrested to the station, the others went to the other addresses, searched, and seized narcotics.

The government's argument in this Court was narrower than the position adopted in the case at bar by the lower court, but it depended fundamentally upon the same notion, *i.e.*, that probable cause for an arrest affords sufficient protection so that search warrant requirements may be dispensed with. As the government put it: "It is submitted that *where an officer may arrest without warrant*, he may also *at that same time* search without warrant in any place *in the immediate vicinity* where it is clearly indicated that the instruments of the crime (not evidence merely) are hidden." *Id.*, at 25 (emphasis supplied).

This Court replied:

> "The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted. . . . But the right does not extend to other places. Frank Agnello's house was several blocks distant from Alba's house, where the arrest was made. When it was entered and searched, the conspiracy was ended and the defendants were under arrest and in custody else-

where. That search cannot be sustained as an incident to the arrests." *Id.*, at 30-31.

In so holding, the Court was applying the principle established earlier in *Weeks* v. *United States*, 232 U.S. 383 (1914), and in *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920). In *Weeks*, a federal marshal searched the home of a person who had been arrested by local officers earlier in the day at his place of employment and seized materials that were later introduced at the trial. In ruling that the search and seizure violated the Fourth Amendment, the Court stated:

> "The case . . . involves the right of a court to retain for the purposes of evidence the letters and correspondence of the accused, seized in his house in his absence and without his authority, by a United States Marshal holding no warrant for his arrest and none for the search of his premises. . . . The United States Marshal could only have invaded the house of the accused when armed with a warrant issued as required by the Constitution, upon sworn information and describing with reasonable particularity the thing for which the search was to be made. . . . " 232 U.S., at 393.

And in *Silverthorne*, the Court condemned as "without a shadow of authority" a search of defendants' office that was made after they were arrested in their homes and while they were detained. 251 U.S., at 390.

While some members of the Court in subsequent cases thought the *Agnello dictum* as to what "is not to be doubted" about the type of search and seizure which may be made incident to an arrest went too far, see *Harris* v. *United States*, 331 U.S. 145, 155, 183, 195 (1947) (dissenting opinions); *United States* v. *Rabinowitz*, 339 U.S. 56, 68 (1950)

(dissenting opinion); *Davis* v. *United States*, 328 U.S. 582, 594, 623 (1946) (dissenting opinions); *Zap* v. *United States*, 328 U.S. 624, 630 (1946) (dissenting opinion), the *Agnello* holding as to what may *not* be searched—a house substantially removed geographically from the place of arrest at a time not substantially contemporaneous with the arrest—has never been questioned in any subsequent opinion in this Court.[7]

D. *The* Agnello *Holding Has Been Consistently Followed by the Lower Courts.*

While there have been disagreements in the lower federal courts over the permissible scope of a search and seizure incident to arrest, the *Agnello* holding has been well beyond the area of dispute. To put it differently, a long line of lower federal court decisions is wholly at odds with the state court holding in the case at bar.

A good example is a recent decision by the Court of Appeals for the Ninth Circuit, *Mosco* v. *United States*, 301 F.2d 180 (1962). There, after investigation of a robbery, the officers went to the suspect's apartment to arrest him. After receiving no response to their knock, they entered the apartment through the aid of the landlord. In looking through the apartment to verify that the suspect was not there, they found one of the items later introduced into evidence. The suspect returned about a half an hour later and was placed under arrest. The court held that, whatever may be the rule as to whether the arrest must

[7] For a recent indication by the Court of the continued vitality of the *Agnello* doctrine, see *Ker* v. *California*, 374 U.S. 23, 42 n. 13 (1963) ("In cases in which a search could not be regarded as incident to arrest because the petitioner was not present at the time of the entry and search, the absence of compelling circumstances . . . supported the Court's holdings that searches without warrants were unconstitutional."). See also *Lustig* v. *United States*, 338 U.S. 74, 79-80 (1949).

precede the search where the person is available for arrest, the federal rule "does not sanction a search made before the individual is available for arrest." The court observed:

> "In this particular case, moreover, it was a pure coincidence that Mosco appeared at his apartment within a few minutes after the search. . . .
>
> "If it had turned out that Mosco was arrested somewhere else, or arrested at his apartment the following week, it could not have been said that the search which uncovered Exhibit C was incident to the arrest." *Id.*, at 188.

For similar decisions, see, e.g., *Hershkowitz* v. *United States*, 65 F.2d 920 (6th Cir. 1933) (search of house after arrest outside house held illegal); *Papani* v. *United States*, 84 F.2d 160, 163 (9th Cir. 1936) (search in basement followed in a few minutes by arrest upstairs illegal because "the search was not made at the place of arrest." "[I]t would seem that a search is not incidental to the arrest, unless the search is made at the place of arrest, contemporaneously with the arrest."); *United States* v. *Lee*, 83 F.2d 195, 196 (2d Cir. 1936) ("Appellant was not arrested at the time of the search. The search here could not be justified as an incident to a lawful arrest. . . ."); *United States* v. *Stappenback*, 61 F.2d 955 (2d Cir. 1932) (held illegal a search of building where the arrest had taken place earlier in the day just outside the building); *Hurst* v. *State of California*, 211 F.Supp. 387, 392 (N.D. Cal. 1962) (*habeas corpus* relief granted from state conviction after *Mapp;* alternative holding that search was illegal because it preceded arrest—"The law requires . . . that an arrest be made *prior* to any search of a defendant or of the area under his possession or control, in order that such search be considered as incident to the arrest."); *United*

States v. *Royster*, 204 F.Supp. 760, 762 (N.D. Ohio 1961) ("The Government contends, however, that 'It is irrelevant that the police did not actually arrest Royster prior to searching him so long as probable cause for the arrest existed.' . ... This cannot be done."); *United States* v. *Rutheiser*, 203 F.Supp. 891, 892 (S.D.N.Y. 1962) ("[T]he search took place some three and one-half hours prior to the arrest. It is thus hard to argue that the search was incidental to a lawful arrest."); *United States* v. *Steck*, 19 F.2d 161, 162 (W.D. Pa. 1927) ("[O]fficers making an arrest at a place other than the home are not entitled thereafter to enter and search the home."); *United States* v. *Swan*, 15 F.2d 598, 599 (N.D. Cal. 1926) (search of house followed in one-half hour by arrest upon return of defendant held illegal—"[T]he search was in no sense incidental to an arrest, and moreover was entirely completed before any arrest was made."); *United States* v. *Vallos*, 17 F.2d 390, 392 (D. Wyo. 1926) ("The difficulty in the case at bar, so far as the government's contention is concerned, is that no arrest of the defendant was made at the time or at the place where the search was conducted, so that the validity of the search in this case cannot be based upon the arrest of the defendant."); *United States* v. *Fowler*, 17 F.R.D. 499, 501 (S.D. Cal. 1955) ("Where, as here, officers drive an accused two blocks from the place of arrest to the apartment searched, there is an absence of the element of reasonableness which is required to make the search an incident to the arrest."). See also *Trupiano* v. *United States*, 334 U.S. 699, 707-708 (1948) ("But Antoniole might well have been outside the building. If . . . he had been arrested in the farmyard, the entire argument advanced by the Government in support of the seizure without warrant would collapse.") (overruled in other respects by *Rabinowitz*); Mr. Justice Frankfurter, dissenting in *Harris* v. *United States*, 331 U.S., at 164 ("It would hardly be sug-

gested that such a search could be made without warrant if Harris had been arrested on the street."); Judge Learned Hand in *United States* v. *Kirschenblatt*, 16 F.2d 202, 203 (2d Cir. 1926) ("[B]y hypothesis the power [to search] would not exist, if the supposed offender were not found on the premises. . . .").

To be sure, the application of the *Agnello* principle raises problems of judgment in close cases. Compare, e.g., *Hobson* v. *United States*, 226 F.2d 890, 892 (8th Cir. 1955) ("At the time of the break-in Regina was downstairs near the door. . . . There is no justification in this record for a search of the entire house. . . . "), and *Drayton* v. *United States*, 205 F.2d 35 (5th Cir. 1953) (held illegal a search in upstairs room of rooming house after arrest downstairs), with *Kelley* v. *United States*, 61 F.2d 843, 847 (8th Cir. 1932) (upheld search of barn after arrest outside), and *Safarik* v. *United States*, 62 F.2d 892, 896 (8th Cir. 1933) (The officer could search "the place where [the suspect] is discovered and other places in the immediate vicinity which are clearly indicated as having formed a part of the scene of the crime.").

But, so far as we have discovered, there has been no deviation from the rule that the search must be substantially contemporaneous with the arrest and must not extend beyond the immediate vicinity of the arrest, however those terms may be defined in particular cases. And there can be no genuine doubt that, under this principle, the search and seizure in the case at bar violated the standards of the Fourth Amendment.[8]

---

[8] In this case, as in *Ker* v. *California*, 374 U.S. 23, 43 (1963), there is no need to choose between the California rule that the search may precede the arrest as long as there was independent probable cause for the arrest, e.g., *Willson* v. *Superior Court*, 46

E. *The Decisions in* Harris v. United States *and* United States v. Rabinowitz *Fortify the Conclusion That the Search and Seizure Were Invalid.*

The flagrant unconstitutionality of the search and seizure in the case at bar is underscored by the fact that the decisions in *Harris* v. *United States*, 331 U.S. 145 (1947), and *United States* v. *Rabinowitz*, 339 U.S. 56 (1950), which the Court has described as setting "by far the most permissive limits" for searches incident to arrest, *Abel* v. *United States*, 362 U.S. 217, 235 (1960), fortify petitioner's argument.

In *Harris* and *Rabinowitz*, the Court ruled that the right of search and seizure incident to an arrest extends beyond the person of the individual arrested and subjects within his actual physical control. In so doing, the Court established a broad "rule of reason" for Fourth Amendment decisions. "[S]uch searches turn upon the reasonableness under all the circumstances. . . . " *Rabinowitz* v. *United*

Cal.2d 291, 294 P.2d 36 (1956); *People* v. *Simon*, 45 Cal.2d 645, 290 P. 2d 531 (1955), and what appears to be the federal rule that the search must invariably follow the arrest. See discussion and cases cited in *Mosco* v. *United States*, 301 F.2d 180 (9th Cir. 1962), and in *Hurst* v. *State of California*, 211 F.Supp. 387 (N.D.Cal. 1962), in both of which the California rule was rejected. Whether the so-called federal rule should be adopted so as to insure that the search is truly incident to the arrest rather than the arrest's being a pretext for the search, or whether a more flexible standard should control, there is no resemblance between the case at bar and the typical case in which that issue arises where the time elapsing between the arrest and the search is relatively brief.

It has been observed, however, that in its more extreme manifestations the California doctrine is inconsistent with *Agnello*. Comment, *The Cahan Case: The Interpretation and Operation of the Exclusionary Rule in California*, 4 U.C.L.A. L.Rev. 252, 267 (1957). For an example almost as striking as the case at bar, see *People* v. *Dominquez*, 300 P.2d 194 (Cal. App. 1956), where the court, relying upon *Rabinowitz*, unaccountably read that case as involving a search five days after the arrest.

States, supra, at 65-66.[9] As we have indicated, nothing in those opinions intimates that the time and place requirements upon which *Agnello* turned were to be discarded. Rather, it is evident, as the lower court decisions cited above which followed *Harris* and *Rabinowitz* indicate, that those requirements are to be considered as essential ingredients of Fourth Amendment reasonableness under the *Harris-Rabinowitz* approach.

But *Harris* and *Rabinowitz* plainly indicate that, even if the time and place requirements of *Agnello* are met, a search and seizure may nonetheless be unconstitutional because there are additional elements of the Fourth Amendment "rule of reason," elements firmly rooted in the federal law of search and seizure. If the case at bar is analyzed in terms of these factors, the error in the lower court opinion becomes even more evident.

1. *Character of the items seized.* This Court has long recognized that a search or seizure, to be valid under the Fourth Amendment, must have as its object things which are not "merely evidentiary" but which, for one reason or another, the government has a right to appropriate.

This distinction was the basis for decision in the first significant search and seizure case to be decided by this Court, *Boyd* v. *United States,* 116 U.S. 616 (1886), "a case that will be remembered as long as civil liberty lives in the United States" (Brandeis, *J.*, dissenting in *Olmstead* v. *United States,* 277 U.S. 438, 474 (1928)). The question in *Boyd* was whether in a forfeiture proceeding a person could, consistently with the Fourth and Fifth Amendments, be

[9] Of course, the Court had always viewed Fourth Amendment cases as raising questions of reasonableness; but it was the dissenters' argument in *Harris* that the term "unreasonable" in the Amendment did not call for an *ad hoc* determination in search incident to arrest cases, but rather that as an historical matter a search beyond the person and objects under his actual physical control is unreasonable in the absence of a warrant.

compelled to produce certain documents at pain of having the government's allegations taken as confessed. The Court held that such action was forbidden by both the Fourth and Fifth Amendments, stating:

> "...The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto coelo*. In the one case, the government is entitled to the possession of the property; in the other it is not." 116 U.S., at 623.

The Court's holding was based upon an extensive consideration of the historical background of the Fourth Amendment. Thus, for example, the Court observed that "[e]ven the act under which the obnoxious writs of assistance were issued [footnote omitted] did not go as far as this, but only authorized the examination of ships and vessels, and persons found therein, for the purpose of finding goods prohibited to be imported or exported, or on which the duties were not paid. . . ." *Ibid.* And in *Entick* v. *Carrington*, 19 Howell's St. Tr. 1029 (1765), a decision "considered as one of the landmarks of English liberty," 116 U.S., at 626, Lord Camden ruled illegal a general search warrant that had been used as the basis for examining plaintiff's papers, stating:

> "... [I]t bears a resemblance, as was urged, to the known case of search and seizure for stolen goods. I answer that the difference is apparent. In the one, I am permitted to seize my own goods. . . . In the other, the party's own property is seized before and without conviction. ...
>
> • • • • • •

> "Lastly, it is urged as an argument of utility, that such a search is a means of detecting offenders by discovering evidence. I wish some cases had been shown, where the law forceth evidence out of the owner's custody by process. . . . " Quoted at 116 U.S., pp. 628, 629.

This view that a search or seizure, with or without a warrant, is unreasonable under the Fourth Amendment if designed simply to secure evidence has persisted with undiminished vitality in this Court's decisions. See *Gouled* v. *United States*, 255 U.S. 298, 309 (1921); *Agnello* v. *United States*, 269 U.S. 20, 30 (1925); *Carroll* v. *United States*, 267 U.S. 132, 158 (1925); *Marron* v. *United States*, 275 U.S. 192, 198-199 (1927); *United States* v. *Lefkowitz*, 285 U.S. 452, 465-466 (1932); cf. *Go-Bart Co.* v. *United States*, 282 U.S. 344 (1931); *Davis* v. *United States*, 328 U.S. 582, 603-604 (1946) (dissenting opinion); *Zap* v. *United States*, 328 U.S. 624, 632-633 (1946) (dissenting opinion).

Nor did *Harris* or *Rabinowitz* impair this principle. The items that had been seized in *Harris* were selective service cards, and the crime charged was unlawful possession, concealment, and alteration of such cards. The Court held that the seizure was proper, observing:

> " . . . This Court has frequently recognized the distinction between merely evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest, and on the other hand, those objects which may validly be seized including the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the prisoner arrested

might be effected, and property the possession of which is a crime." 331 U.S., at 154 [footnote omitted].

Similarly, in *Rabinowitz* the items seized were forged stamps, and the Court noted that possessing them was illegal and that they had been used in committing the crime and were therefore to be distinguished from merely evidentiary materials. 339 U.S., at 64 n. 6.

Moreover, as recently as *Abel* v. *United States*, 362 U.S. 217, 237-239 (1960), this Court has tested the constitutionality of a seizure in terms of the *Boyd* principles.[10]

In the case at bar, while the gun and cartridges that were seized were unquestionably proper subjects of search and seizure, the glasses and jacket clearly were not. There is nothing to indicate that they were unusual in any respect so as to constitute a disguise; and, absent any question of disguise, if the clothing a person wears while committing a crime could be considered a means or instrumentality of committing it, it is hard to see what substance the *Boyd* rule would retain. See, e.g., *Morrison* v. *United States*,

---

[10] The lower federal courts have consistently applied the *Boyd* rule. E.g., *Bushouse* v. *United States*, 67 F.2d 843 (6th Cir. 1933); *In Re No. 191 Front Street*, 5 F.2d 282 (2d Cir. 1924); *Freeman* v. *United States*, 160 F.2d 72 (9th Cir. 1947); *In Re Ginsburg*, 147 F.2d 749 (2d Cir. 1945); *Gilbert* v. *United States*, 291 F.2d 586 (9th Cir. 1961), *rev'd on other grounds*, 370 U.S. 650; *Honeycutt* v. *United States*, 277 Fed. 939 (4th Cir. 1921); *Morrison* v. *United States*, 262 F.2d 449 (D.C. Cir. 1958); *Takahashi* v. *United States*, 143 F.2d 118 (9th Cir. 1944); *Williams* v. *United States*, 263 F.2d 487 (D.C. Cir. 1959); *Woo Lai Chun* v. *United States*, 274 F.2d 708 (9th Cir. 1960); *United States* v. *Kirschenblatt*, 16 F.2d 202 (2d Cir. 1926); *United States* v. *Poller*, 43 F.2d 911 (2d Cir. 1930); *United States* v. *Thomason*, 113 F.2d 643 (7th Cir. 1940); *United States* v. *Lerner*, 100 F. Supp. 765 (N.D. Cal. 1951); *United States* v. *Richmond*, 57 F. Supp. 903 (S.D. W.Va. 1944); *United States* v. *Antonelli Fireworks Co.*, 53 F. Supp. 870 (W.D. N.Y. 1943). See, generally, Comment, 20 U. of Chi. L. Rev. 319 (1953).

262 F.2d 449 (D.C. Cir. 1958) (handkerchief that bore tangible evidence of offense not subject to seizure); *Williams* v. *United States*, 263 F.2d 487 (D.C. Cir. 1959) (coat useful as evidence not subject to seizure); *United States* v. *Richmond*, 57 F.Supp. 907 (S.D.W.Va. 1944) (testimony concerning clothing and floor covering not admissible).[11]

Although, as we have indicated, this Court has regarded the principle here discussed as deriving from the Constitution so that consideration of federal and state statutes is not necessary, it may be observed parenthetically that until 1957 in California a search warrant would issue only to seize the types of property falling within the *Boyd* rule, although in that year the statute was amended to permit warrants to issue for a search for evidence.[12] Thus the former California statutory law was in accord with

---

[11] It may be noted that the *Boyd* rule may not apply so as to restrict a search or seizure of the *person* at the time of arrest. See *In Re No. 191 Front Street*, 5 F.2d 282, 285 (2d Cir. 1924); *United States* v. *Kirschenblatt*, 16 F.2d 202 (2d Cir. 1926). This may explain *Hess* v. *United States*, 254 F.2d 578 (8th Cir. 1958), which otherwise would be inconsistent with *Morrison*, *Williams*, and *Richmond*.

[12] Former section 1524 of the California Penal Code authorized warrants only to seize property which "was stolen or embezzled," or which was "used as the means of committing a felony," or which "is in the possession of any person with the intent to use it as a means of committing a public offense, or in the possession of another to whom he may have delivered it for the purpose of concealing it or preventing its being discovered," or certain other specified items belonging to another person.

In 1957, the statute was amended so as to permit search for any item which "constitutes any evidence which tends to show that a felony has been committed, or tends to show that a particular person has committed a felony." Cal. Stats. 1957, c. 1884, p. 3289, §1.

For other state statutes similar to former section 1524, see 1 Varen, Searches, Seizures, and Immunities 219-220 (1961).

Rule 41(b), Fed. R. Crim. P.,[13] as well as with the first federal general search warrant statute, 40 Stat. 228 (1917).[14] It may also be worth noting that the Los Angeles Chief of Police, in an affidavit submitted in connection with a petition for rehearing in *People* v. *Cahan*, 44 Cal. 434, 282 P.2d 905 (1955), the decision establishing the exclusionary rule in California, stated that a principal reason for not using the warrant procedure was to avoid these former restrictions in the California statute.[15] As Mr. Justice Jackson has said, "[the Court] must remember that the extent of any privilege of search and seizure without

---

[13] "A warrant may be issued under this rule to search for and seize any property

"(1) Stolen or embezzled in violation of the laws of the United States; or

"(2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; or

"(3) Possessed, controlled, or designed or intended for use or which is or has been used in violation of Title 18, U.S.C. §957."

[14] "A search warrant may be issued under this title upon either of the following grounds:

"1. When the property was stolen or embezzled in violation of a law of the United States; . . .

"2. When the property was used as the means of committing a felony; . . .

"3. When the property, or any paper, is possessed, controlled, or used in violation of section twenty-two of this title; . . ."

[15] He said:

"(4) Under Section 1524 of the Penal Code, a search under a warrant may not be made for evidence as such, but only for stolen property or for tools of a crime. . . .

"(6) Consequently, if evidence of the kind which cannot be sought under a warrant is to be obtained at all, it must be obtained without a warrant, and the test of the lawfulness of a quest for such evidence is its reasonableness. . . ." Quoted in Barrett, *Exclusion of Evidence Obtained by Illegal Searches —A Comment on People v. Cahan*, 43 Cal. L. Rev. 565, 570 n. 30 (1955).

warrant which [it] sustain[s], the officers interpret and apply themselves and will push to the limit." *Brinegar* v. *United States*, 338 U.S. 160, 182 (1949) (dissenting opinion).

2. *Authority for entry into room.* From *Boyd*, 116 U.S., at 630, to *Ker* v. *California*, 374 U.S. 23 (1963), this Court has recognized that the legality of the entry into a home is an important circumstance in judging the constitutionality of an ensuing search and seizure. Indeed, until *Ker* the Court had not sanctioned a search of a home incident to arrest in any case in which neither an arrest warrant nor a search warrant had been issued.[16]

Thus, in *Gouled* v. *United States*, 255 U.S. 298, 306 (1921), where an agent had gained access to an office by pretending to make a friendly call and in the defendant's absence had seized several documents, the Court held that there had been a violation of the Fourth Amendment, stating:

> " . . . [W]hether entrance to the home or office of a person suspected of crime be obtained by . . . stealth, or through social acquaintance, or in the guise of a business call, and whether the owner be present or not when he enters, any search and seizure subsequently and secretly made in his absence, falls within the scope of the prohibition of the Fourth Amendment. . . . "

In *Go-Bart Co.* v. *United States*, 282 U.S. 344, 358 (1931), the Court emphasized that the "lawless invasion of the premises" had been committed without a valid warrant of any kind; and in *United States* v. *Lefkowitz*, 285 U.S. 452,

---

[16] See the discussion of the significance of an arrest warrant in connection with incidental search in Mr. Justice Brennan's dissenting opinion in *Abel* v. *United States*, 362 U.S. 217, 249 (1960).

In California, an arrest without a warrant is authorized where the officers have reasonable cause to believe that the suspect has committed a felony. Cal. Penal Code, §836(3).

465 (1932), where the search incident to arrest was held illegal, the Court distinguished *Marron* v. *United States*, 275 U.S. 192 (1927), in part on the ground that there the officers had been "lawfully on the premises" by virtue of a valid search warrant. In *Trupiano* v. *United States*, 334 U.S. 699 (1948) (overruled by *Rabinowitz*), both the majority and the dissenters concurred as to the relevance of legality of entry. *Id.*, at 709, 712. And in *Johnson* v. *United States*, 333 U.S. 10 (1948), where the Court struck down a search because of the invalidity of the arrest, the Court stated: "An officer gaining access to private living quarters under color of his office and of the law which he personifies must then have some valid basis in the law for the intrusion." *Id.*, at 17.

In *McDonald* v. *United States*, 335 U.S. 451, 459 (1948), where officers climbed through a window in order to ascertain whether a numbers racket was in operation, Mr. Justice Jackson's concurring opinion, in which Mr. Justice Frankfurter joined, emphasized the illegality of the entry, declaring that it was "a felony in law and a crime far more serious than the one they were engaged in suppressing." See also *Weeks* v. *United States*, 232 U.S. 383, 393-394 (1914); *United States* v. *Jeffers*, 342 U.S. 48, 52 (1951) ("[T]heir intrusion was conducted surreptitiously and by means denounced as criminal."); *Miller* v. *United States*, 357 U.S. 301 (1958); *Chapman* v. *United States*, 365 U.S. 610, 616 (1961); *Silverman* v. *United States*, 365 U.S. 503 (1961); *Davis* v. *United States*, 328 U.S. 582, 623 (1946) (dissenting opinion); cf. *Irvine* v. *California*, 347 U.S. 128, 132 (1954).

Harris and *Rabinowitz* are fully in accord with this approach. In *Harris*, the Court noted, "Here the agents entered the apartment under the authority of lawful warrants of arrest. Neither was the entry tortious. . . ." 331 U.S., at 153. And in *Rabinowitz* not only had the

officers secured arrest warrants, but, as the Court pointed out, "[T]he place of the search was a business room to which the public, including the officers, was invited." 339 U.S., at 64.[17]

In the case at bar, the entry issue may be phrased as follows: Did the officers, as part of their effort to make an arrest, have the right, without any warrant and without petitioner's permission, to gain access to petitioner's room by unlocking the door, when so far as appears they did not believe he was in the room and when in fact he was not there? In so stating the question, it will be noted that we assume for the moment that the record establishes that the aim of the officers in entering was not to search but was rather to effect an arrest, perhaps by waiting for petitioner to return. The evidence as to this assumption is conflicting, and we discuss it in a later section of the brief. However, the suggestion of the lower court that the officers might not have believed the room clerk's statement that petitioner was not in the room, 205 Cal. App. 2d, at 113 (R. 126), has no support whatsoever in the record and should not be accepted. No officer so testified, nor was there any evidence from which such an inference could be drawn. For example, the officers did not state that they took any of the precautions that would have been normal had they thought an armed robber was in the room, nor did they testify that they followed the procedure specified by state law with respect to demanding admittance and explaining their mission.[18]

---

[17] In *Rabinowitz*, however, the Court did indicate that absence of the warrant would not have been fatal. *Id.*, at 60.

[18] "To make an arrest, . . . in all cases a peace officer, may break open the door or window of the house in which the person to be arrested is, or in which . . . [he has] reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired." Cal. Penal Code, §844.

While we have found no case in this Court squarely raising the question whether officers may, as part of an effort to arrest but without any warrant, enter a locked dwelling even though they have no cause to believe, and do not believe, the suspect is there, the strictness with which this Court has viewed entry without a warrant suggests that such a right probably does not exist, at least absent extraordinary circumstances.[19] In particular, this appears to be the implication of *Ker* v. *California*, 374 U.S. 23 (1963). In that case, all of the members of the Court, with the possible exception of Mr. Justice Harlan, appear to have shared the view that, as a matter of constitutional law, an arresting officer may not force entry into a home without first identifying himself, announcing his mission, and requesting admittance. The implication, we suggest, is that, at least in the absence of extraordinary circumstances, the householder is to be given the opportunity to consent to entry. Consequently, where consent cannot be obtained because no one is home, there can be no right to enter.

See also *Jones* v. *United States*, 357 U.S. 493, 499-500 (1958), where the Court did not reach what it characterized as the "grave constitutional question . . . whether the forceful nighttime entry into a dwelling to arrest a person reasonably believed within, upon probable cause that he had committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought, is consistent with the Fourth Amendment." Presumably the question would have been even graver if the officers had not had reasonable cause to believe the suspect was in the house, and the dissenting opinion contains no contrary

[19] While this issue is one of constitutional law, it may be noted that the California statute respecting the right to force entry to make an arrest, quoted *supra* note 18, carries the same implication by requiring that the person either be in the house or that the officer have "reasonable grounds for believing him to be" there.

implication. See, *id.*, at 503. ("There being probable cause here to believe that a felon was within the house, the entry of the officers was lawful, even though after a complete search the belief was found to be incorrect.") And see *Lustig* v. *United States*, 338 U.S. 74, 79 (1949).

A number of lower federal court decisions directly support petitioner's position as to the legality of the entry in this case. One of the decisions closest on its facts to the case at bar is *Morrison* v. *United States*, 262 F.2d 449 (D.C. Cir. 1958). There, officers set out to make an arrest; they were advised by a bystander that the suspect was in his house; they knocked at the door but received no response; they thereupon entered through an opening in the basement and searched the house for the suspect without success; and in the course of that search they seized certain incriminating evidence. Judge Prettyman, writing for the court, held the seizure unconstitutional because of the unconstitutionality of the entry.[20] So far as the case at bar is concerned, this holding is *a fortiori*, for here the officers did not even have any reason to believe petitioner would be in

---

[20] The court assumed the officers had reason to believe the suspect was in the house, but stated:

"... But they had no personal knowledge that he was there ....

"The officers entered the house to make a search. It was, to be sure, a search for a person ... but it was a search .... It is true they intended to arrest him if they found him .... But the search was a factual prerequisite to an arrest; it was the first objective of the entry; the officers did in fact search the house ....

* * * * * *

"Morrison did not refuse admittance to the officers; he was not there. Under those conditions the basic principle of the rule governing searches and seizures comes into play .... A man's home is just as private when he is not there as when he is. Police officers cannot, without a warrant of any kind, walk into an unoccupied, unlocked private home and search it, either for property or for a person. ..." *Id.*, at 452, 453.

the room and, so far as the record indicates, did not think he was.

A number of other decisions support the *Morrison* approach. On the whole, the lower courts appear to have confined the right of entry without a warrant in order to arrest to situations where a felony is committed in the presence of the officer so that there is an urgent necessity to suppress the crime. See, e.g., *Cardinal* v. *United States*, 79 F.2d 825 (6th Cir. 1935); *Rocchia* v. *United States*, 78 F.2d 966 (9th Cir. 1935); *Smith* v. *United States*, 254 F.2d 751 (D.C. Cir. 1958); *United States* v. *Lee*, 83 F.2d 195 (2d Cir. 1936); *Rouda* v. *United States*, 10 F.2d 916 (2d Cir. 1926); *Lindsly* v. *United States*, 12 F.2d 771 (5th Cir., 1926).[21]

If commission of a felony in the presence of the officers is to be the touchstone, naturally the entry here was illegal, since petitioner was not even there to commit a crime. See *Raniele* v. *United States*, 34 F.2d 877 (8th Cir. 1929), where the court rejected the argument that entry was justified because a crime was being committed in the presence of the officers, stating:

---

[21] For a detailed analysis of the relevant historical materials, see *Accarino* v. *United States*, 179 F.2d 456 (D.C. Cir. 1949), where the court held illegal a forced entry by officers who had probable cause to believe a gambling offense was being committed, because "from the early days of the common law the breaking of doors to make an arrest without a warrant was lawful only if necessary." *Id.*, at 464. Also, of course, Mr. Justice Brennan's opinion for the Court in *Miller* v. *United States*, 357 U.S. 301 (1958), and his opinion (dissenting in this respect) in *Ker* v. *California*, 374 U.S. 23, 46 (1963), sets forth a great deal of relevant historical data. See also cases cited in Annot., 5 A.L.R. 263, which opens with the statement: "It is well settled that a police officer or a private person may make a peaceable or forcible entry to search any premises without a search warrant, for the purpose of arresting one accused of felony, or guilty of breach of the peace or misdemeanor committed in his presence. *But the person making the search must have reasonable and just cause to believe the person he seeks to arrest is on the premises searched.*" (Emphasis added.)

"'. . . First, the smell [of fermenting mash] did not give the prohibition agent knowledge that any person was in the house or had possession or control of the fermenting mash. If the prohibition agent had entered the house and found no person there, but had seized the still, and the next day had found the owner of the house in town and had arrested him, it could hardly be claimed that the search and seizure were lawful. . . . The fact that the prohibition agent happened to find the owner in the house does not alter the case." *Id.*, at 879-880.

For similar cases, see *In Re Phoenix Cereal Beverage Co.*, 58 F.2d 953 (2d Cir. 1932) (no showing that the officers knew people were in building); *Staker* v. *United States*, 5 F.2d 312 (6th Cir. 1925) (same as *Raniele*); *Gibson* v. *United States*, 149 F.2d 381 (D.C. Cir. 1945) (illegal entry into third person's house in search of suspect who was not in house and apparently had no connection with it); *Gatewood* v. *United States*, 209 F.2d 789, 792 (D.C. Cir. 1953) (entry by deception into house of third person—"The illegality of the officers' action was aggravated by their inexcusable ignorance of the fact that the [suspect] was already in custody, and by the weakness of their reason for believing she was in Gatewood's apartment:"); cf. *McKnight* v. *United States*, 183 F.2d 977 (D.C. Cir. 1950) (could have arrested on street and therefore no need for forced entry); *Pong Ying* v. *United States*, 66 F.2d 67 (3d Cir. 1933).

In sum, decisions of this Court and of the lower federal courts support the conclusion that there was an unconstitutional search in this case at the moment of entry because the officers entered without permission and neither believed nor had reason to believe that petitioner would be found in the room.[22]

[22] We might add that our position does not depend upon the particular means used to gain entry. The interest to be protected

3. *No Crime Was Committed in the Presence of the Officers.* Both *Harris* and *Rabinowitz* indicate that the scope of the search and seizure properly attendant upon an arrest may depend in part upon whether a crime was committed in the presence of the arresting officers. 331 U.S., at 155; 339 U.S., at 64. As has been noted, this consideration has also been regarded by the lower federal courts as important in connection with the right of officers to enter a home without a warrant, which is simply another aspect of the broad problem of the reasonableness of searches and seiz-

---

is that of privacy of the home, and the protection in the circumstances of this case should not turn upon whether the latch is on.

The situation may be different where the question is whether the officers have the right to force entry to arrest a person they believe or know is in the room. In such circumstances, some courts have suggested that there may be a distinction with respect to legality of entry depending upon whether the entry was forced or, in contrast, whether it was with some sort of permission or at least "peaceable." See, e.g., *Washington* v. *United States*, 263 F.2d 742 (D.C. Cir. 1959) (distinguishing *Morrison* v. *United States*, *supra*); *Smith* v. *United States*, 254 F.2d 751 (D.C. Cir. 1958); *Hopper* v. *United States*, 267 F.2d 904 (9th Cir. 1959).

Were the question of "breaking" important, we would argue that the turning of a lock amounts to a breaking. See *Keiningham* v. *United States*, 287 F.2d 126, 130 (D.C. Cir. 1960) (opening of unlocked door is a "breaking" within the meaning of 18 U.S.C. 3109, the federal "announcement" statute); Wilgus, *Arrest Without a Warrant*, 22 Mich. L.Rev. 798, 806 (1924) ("What constitutes 'breaking' seems to be the same as in burglary: lifting a latch, turning a door knob, unhooking a chain or hasp, removing a prop to, or pushing open, a closed door of entrance to the house . . . ."), and cases there cited; and cf. *Ker* v. *California*, 374 U.S. 23, 38 (1963).

Finally, we note that cases holding that a mere trespass does not render a subsequent search or seizure unconstitutional are not relevant. See e.g., *Hester* v. *United States*, 265 U.S. 57 (1924); *Koth* v. *United States*, 16 F.2d 59 (9th Cir. 1926); *Giacona* v. *United States*, 257 F.2d 450, 456 (5th Cir. 1958). The point of decisions like *Hester* is simply that where there is an intrusion upon someone else's property which is illegal as a matter of property law, but where the property itself is not protected by the Fourth Amendment, such as open farm land, whatever violation there is is not of the Constitution. Compare such cases with *Silverman* v. *United States*, 365 U.S. 505 (1961).

ures. The *Harris-Rabinowitz* suggestion that, apart from the legality of entry, the search and seizure may be illegal if not justified by the necessity of suppressing commission of a crime is solidly based on prior opinions of this Court and the lower federal courts. See *Agnello* v. *United States*, 269 U.S. 20, 30 (1925); *Go-Bart Co.* v. *United States*, 282 U.S. 344, 357 (1931); *McDonald* v. *United States*, 335 U.S. 451, 462-463 (1948) (dissenting opinion); *Marron* v. *United States*, 275 U.S. 192, 198-199 (1927); *United States* v. *Lefkowitz*, 285 U.S. 452, 463, 465 (1932); *Catagrone* v. *United States*, 63 F.2d 931, 932 (8th Cir. 1933); *Gilbert* v. *United States*, 291 F.2d 586, 593 (9th Cir. 1961), *rev'd on other grounds*, 370 U.S. 650; *Johnson* v. *United States*, 270 F.2d 721, 723 (9th Cir. 1959); *United States* v. *Lee*, 308 F.2d 715, 717 (4th Cir. 1962); *Safarik* v. *United States*, 62 F.2d 892, 896 (8th Cir. 1933); *Sayers* v. *United States*, 2 F.2d 146, 147 (9th Cir. 1924); *Smith* v. *United States*, 254 F.2d 751, 754 (D.C. Cir. 1958).

While it is true that the "in the presence of" doctrine was given considerable elasticity in *Harris*, where the crime consisted of the possession of items about which the officers were ignorant until they came upon them in the course of the search,[23] there is no way the principle can be stretched far enough to apply in the case at bar.

4. *Summary.* These various factors relating to the reasonableness of a search and seizure may perhaps best be summarized by comparing the facts in this case to the facts as described by the Court in *Rabinowitz*, 339 U.S., at 64.

---

[23] Compare *Harris* with *McBride* v. *United States*, 284 Fed. 416, 419 (5th Cir. 1922). ("Where an officer is apprised by any of his senses that a crime is being committed, it is being committed in his presence. . . ."); *United States* v. *Chodak*, 68 F.Supp. 455, 458 (D.Md. 1946); *Garske* v. *United States*, 1 F.2d 620, 623 (8th Cir. 1924). See also Wilgus, *Arrest Without a Warrant*, 22 Mich. L.Rev. 673, 679-684 (1924).

There the Court stated that its holding was based upon the following considerations:

> "(1) The search and seizure were incident to a valid arrest; (2) the place of the search was a business room to which the public, including the officers, was invited; (3) the room was small and under the immediate and complete control of respondent; (4) the search did not extend beyond the room used for unlawful purposes; (5) the possession of the forged and altered stamps was a crime . . . "

"' . . . [T]he objects searched for and seized here, having been utilized in perpetrating a crime . . . were properly subject to seizure. Such objects are to be distinguished from merely evidentiary materials which may not be taken into custody. . . . '"

In the case at bar, the search and seizure were not incident to an arrest nor was the petitioner in immediate and complete control of the area searched, because petitioner was not present in the room but rather was arrested 37 hours later in another state; the place of search was not a business room, but rather was a hotel room to which the officers were decidedly not invited and into which their intrusion was illegal; the search did extend beyond a room used for unlawful purposes because the room was not used for such purposes at all; and the objects seized, except for the gun and the cartridges, were not means of committing a crime nor was possession of them a crime.

In these circumstances, the search and seizure are properly characterized as the type of general, exploratory search for evidence that, as this Court has repeatedly emphasized, was a principal target of the Fourth Amendment. See, e.g., *Boyd* v. *United States*, 116 U.S. 616, 625-629 (1886); *Weeks* v. *United States*, 232 U.S. 383, 393-394 (1914); *Go-Bart Co.* v. *United States*, 282 U.S. 344, 357 (1931); *United States* v. *Lefkowitz*, 285 U.S. 452, 465 (1932); *Harris* v. *United*

States, 331 U.S. 145, 153 (1947); *United States* v. *Rabinowitz*, 339 U.S. 56, 62 (1950); *Kremen* v. *United States*, 353 U.S. 346 (1957); *Wong Sun* v. *United States*, 371 U.S. 471, 481 n. 9 (1963).[24] It is clear from the record that, as opposed to cases like *Harris* and *Rabinowitz*, this was not a situation in which the officers were seeking particular items for which they could have obtained a warrant. Rather, as in cases like *Go-Bart Co.*, *Lefkowitz*, and *Kremen*, the officers' "systematic search," as officer Gilliland described it (R. 72), was obviously designed simply to uncover whatever evidence there might be in the room.[25] It seems plain enough that the restrictions discussed in the preceding portions of this brief are designed to provide safeguards against just this type of search. Putting aside the question whether these requirements actually afford protection equivalent to that given by the terms of the Amendment when warrants are sought, surely where they are not met the search and seizure is unreasonable within the meaning of the Amendment.

F. *The Failure of Proof as to Inability to Secure a Warrant Is Relevant.*

While it is true that *Rabinowitz* held that "[t]o the extent that *Trupiano* v. *United States*, 334 U.S. 699 requires a search warrant solely on the basis of the practicability of procuring it rather than upon the reasonableness of the search after a lawful arrest, that case is overruled," 339

---

[24] For a good summary of the historical materials and for citations to secondary sources, see Reynard, *Freedom from Unreasonable Search and Seizure– A Second Class Constitutional Right?* 25 Ind. L.J. 259-277 (1950). And see generally Lasson, The History And Development Of The Fourth Amendment To The United States Constitution (1937).

[25] It may be noted that the evidence introduced at trial was not all that was seized, which included in addition "certain address books and other miscellaneous evidence" (Officer Gilliland, R. 73).

U.S., at 66, it does not follow that the failure to get a warrant is entirely irrelevant under the *Harris-Rabinowitz* approach. Rather, we suggest that this factor should still be considered as bearing upon reasonableness. Such an interpretation was given *Rabinowitz* in *Rent* v. *United States*, 209 F.2d 893, 899 (5th Cir. 1954), and in *Clay* v. *United States*, 239 F.2d 196, 204 (5th Cir. 1956). See also *Ker* v. *California*, 374 U.S. 23, 41 (1963) ("The practicability of obtaining a warrant is not the *controlling* factor. . . . " (emphasis supplied); *Baxter* v. *United States*, 188 F.2d 119, 120 (6th Cir. 1951).

In the case at bar, there was no showing that there was insufficient time to secure a warrant. The hotel was entered two days after commission of the crime; and, while there is no indication of how rapidly the police moved after securing a tentative identification of the suspect, there is no basis for a conclusion that one of the officers on the force could not have taken Gilliland's place in going to the hotel while Gilliland sought a warrant. Similarly, the officers were in the room for a full 13 hours, and no reason appears why matters could not have been arranged so that Gilliland could have used part of that time to secure a warrant before the "systematic search" was made.

G. *The Search and Seizure Were Illegal Because the Purpose Was to Search Rather Than to Arrest.*

To this point, we have assumed the correctness of the lower court's view that the police, in entering petitioner's room, intended to facilitate an arrest rather than to search. However, in point of fact the record is insufficient to sustain such an assumption. Supporting the lower court's conclusion are the considerations that the officers may have had probable cause to secure an arrest warrant and that Gilliland testified that he told the room clerk that they

"were there to make an arrest of a man who had possibly committed a robbery" (R. 72). Against this is the fact that the officers did *not* seek an arrest warrant (and there is nothing in the record to indicate that they did not have time); Gilliland's statement that "at this time [after the search] we determined that this would be the suspect in our particular robbery" (R. 74); and the fact that at no point did any officer testify directly that at the time of entry they intended to arrest (as opposed to testimony as to what they told the clerk) or that they did not intend to search.

While the record consequently is ambiguous as to the officers' intent, we submit that the ambiguity is to be resolved against the state, not against petitioner. "Over and again this Court has emphasized that the mandate of the Amendment requires adherence to judicial processes . . . Only where incident to a valid arrest . . . or in 'exceptional circumstances' . . . may an exemption lie, *and then the burden is on those seeking the exemption to show the need for it* . . . ." *United States* v. *Jeffers*, 342 U.S. 48, 51 (1951) (emphasis supplied).

If, then, the case be regarded as one in which the purpose of the officers was probably to make a search rather than to facilitate an arrest, *United States* v. *Jeffers, supra*, is controlling. There, acting on information that narcotics were hidden in a hotel room, officers entered with the assistance of the manager, searched, and seized narcotics. No one was in the room; the suspect was arrested the next day. The Court held the search and seizure unconstitutional on the ground that there had been neither consent to the entry nor exceptional circumstances justifying the failure to get a warrant, such as a probability of violence or the threat of imminent destruction or removal of the contraband. In the case at bar, just as in *Jeffers*, there could be

no such circumstances since petitioner was not even in the room.

The *Jeffers* decision is one of a series of decisions in this Court and in the lower federal courts requiring a search warrant if the object of the officers is search rather than arrest, except arguably in the type of exceptional circumstances referred to in *Jeffers*—circumstances, we may note, that neither this Court nor any lower federal court, so far as we have discovered, has found except in the case of moving vehicles. For decisions as dispositive as *Jeffers*, see *Chapman* v. *United States*, 365 U.S. 610 (1961); *Jones* v. *United States*, 357 U.S. 493 (1958); *Johnson* v. *United States*, 333 U.S. 10 (1948); and *Taylor* v. *United States*, 286 U.S. 1 (1932). See also, e.g., *Agnello* v. *United States*, 269 U.S. 20, 32-33 (1925) (*dictum*); *Brinegar* v. *United States*, 338 U.S. 160 (1949) (automobile); *Carroll* v. *United States*, 267 U.S. 132 (1925) (automobile); *Henry* v. *United States*, 361 U.S. 98, 104 (1959) (automobile); *Husty* v. *United States*, 282 U.S. 694 (1931) (automobile); *McDonald* v. *United States*, 335 U.S. 451 (1948); *United States* v. *Di Re*, 332 U.S. 581 (1948); *Henderson* v. *United States*, 12 F.2d 528 (4th Cir. 1926); *Lee* v. *United States*, 232 F.2d 354 (D.C. Cir. 1956); *Temperani* v. *United States*, 299 Fed. 365 (9th Cir. 1924); *McKnight* v. *United States*, 183 F.2d 977 (D.C. Cir. 1950); *Walker* v. *United States*, 225 F.2d 447 (5th Cir. 1955).

III.

The Harris and Rabinowitz Doctrines Should Be Overruled.

While we think it clear that this case can be disposed of without limiting the doctrines established in *Harris* and *Rabinowitz*, we nonetheless think it appropriate to request that the Court reconsider those decisions with respect to the scope of the search that may accompany an arrest.

In requesting this review, we are motivated by the following considerations: First, passages in some recent opinions of this Court suggest the existence of doubts as to whether *Harris* and *Rabinowitz* were correctly decided. See *Abel* v. *United States*, 362 U.S. 217, 235, 248-249 (1960); *Wong Sun* v. *United States*, 371 U.S. 471, 480 n. 8 (1963); *Ker* v. *California*, 374 U.S. 23, 41-42 (1963). Indeed, in *Chapman* v. *United States*, 365 U.S. 610, 618, 623, Mr. Justice Frankfurter, in concurring, and Mr. Justice Clark, in dissenting, were both of the view that the Court's decision was inconsistent with *Rabinowitz*.

Next, while we recognize that in normal circumstances the Court would not overrule a prior decision if the case could be disposed of in different fashion, it is far from clear that the issue here involved is a proper subject for this form of judicial restraint. Certainty as to the applicable rules is surely desirable for the officer who must make his search and seizure determinations on his beat. Moreover, it is difficult to see how additional experience under the existing rules can be of substantial benefit. The issue is not one of those broad questions that, if left to the workings of the political process for a time, may become easier of solution. If *Harris* and *Rabinowitz* were mistakes, the sore is festering, not healing, for it is plain enough that the incident to arrest "exception" is rapidly becoming the rule

and that search warrants are becoming a relic of the past. Thus, the investigation of one commentator has disclosed that "[a]s a matter of practice . . . search warrants are seldom used by the police. In populous Los Angeles County, for example, only 17 such warrants were issued in all of 1954." Barrett, *Exclusion of Evidence Obtained by Illegal Searches—A Comment on People* v. *Cahan*, 43 Cal. L. Rev. 565, 570 (1955).[26]

Finally, with all deference we submit that the decisions in *Harris* and *Rabinowitz* were in error. The arguments supporting our view are exhaustively set forth in the dissenting opinions in those cases, upon which we rely.[27] We wish only to make a few additional observations.

We suggest that a fundamental defect in the *Harris-Rabinowitz* doctrine is that it identifies as relevant to the

---

[26] See also, e.g., Kaplan, *Search and Seizure: A No-Man's Land in the Criminal Law*, 49 Cal. L. Rev. 474, 490 (1961) ("This exception today is so broad that . . . it is safe to say that the number of searches which are upheld under this exception far exceeds the number where a search warrant has been procured."); Comment, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U.Chi. L.Rev. 664, 684 n. 117 (1961) (in Philadelphia in 1952 only 3% of arrests were authorized by warrants, and although searches were involved in most of the cases the use of warrants in those examined was virtually non-existent, citing Note, *Philadelphia Police Practice and the Law of Arrest*, 100 U.Pa. L.Rev. 1182 (1952)); Comment, *The Cahan Case: The Interpretation and Operation of the Exclusionary Rule in California*, 4 U.C.L.A. L.Rev. 252, 258 (1957) ("It is significant that since the *Cahan* case was handed down, there have been very few California decisions concerning search warrants, indicating that such warrants are not being used."); Comment, *Search and Seizure: A Review of the Cases since People* v. *Cahan*, 45 Cal. L.Rev. 50, 53 (1957).

[27] For general discussions of this problem, see, e.g., Way, *Increasing Scope of Search Incidental to Arrest*, 1959 Wash. U. L.Q. 261; Kaplan, *Search and Seizure: A No-Man's Land in the Criminal Law*, 49 Cal. L.Rev. 474, 490 *et seq.* (1961); Reynard, *Freedom From Unreasonable Search and Seizure—A Second Class Constitutional Right?*, 25 Ind. L.J. 259 (1950).

reasonableness test factors which are not compatible, with the result that neither the lower courts nor the police are given adequate guidance.

The difficulties inherent in the *Harris-Rabinowitz* approach are illustrated in the case at bar. The lower court decision is perfectly consistent with one test suggested in *Harris*, i.e., the test of constructive control, since petitioner no doubt had as much constructive control of the room when he was out of it as when he was in it. But if this criterion were to govern, then plainly there would be no limits at all to an incidental search of a home.

Presumably it was in an effort to avert this result that the Court in *Harris* and *Rabinowitz* indicated that the factors discussed in the preceding portions of this brief should also be considered. But, while these other factors are well grounded in Fourth Amendment law as relevant to *a* search incident to arrest doctrine, they have no rational relation to the doctrine that includes constructive control as one of its elements.

Thus, for example, if the rule were to be that the search incident to arrest should be limited to what is necessary to make the arrest effective, so that in normal circumstances it would not extend beyond the person and things within his immediate physical control, then obviously the time and place requirement of *Agnello* would be of critical importance. But if constructive control is a valid justification for the search, why should application of that test turn upon whether the person was unfortunate enough to be arrested at home rather than in the street?

Similarly, the fact that a crime is committed in the presence of officers might well be an independent basis in some circumstances for a relatively broad search incident to arrest, in view of the officers' duty to suppress crime

swiftly wherever it is found. However, once again it is difficult to perceive why the constructive control test, if it is valid, should be restricted by the wholly independent consideration whether a crime is committed in the officers' presence. And it may be added that further confusion is generated by the fact that, since the "possession" crimes involved in *Harris* and *Rabinowitz* were not committed in the officers' presence in any sense related realistically to the necessity for search without a warrant, this test has been attenuated to such an extent that it is difficult to know what it really means.

In short, we suggest that the *Harris-Rabinowitz* doctrine in substance consists of the germ of a rule, expressed in terms of constructive control, that would broadly substitute probable cause for arrest in place of the detailed search warrant requirements of the Fourth Amendment, limited in turn by restrictions at odds with this purpose. Such a rule is incompatible with the purpose and history of the Amendment, as the dissenters in these two cases demonstrated, and also cannot provide predictability in an area where clearly understandable rules are of great importance.

In these circumstances, we urge the Court to adopt the position of the dissenters in *Harris* and *Rabinowitz*. A rule that no search or seizure incident to an arrest can be conducted without a warrant except to the extent necessary to make the arrest effective is firmly rooted in the policy of the Fourth Amendment and can be applied with reasonable consistency. To be sure, peripheral problems would still arise. Thus, for example, in some cases there would no doubt be questions as to whether a search through a house was really designed to protect the officers by finding lurking confederates. But the problems created by the

Harris-Rabinowitz doctrine lie at its center, not at its periphery.

Of course, given the *Harris-Rabinowitz* rule, we rely upon its limitations. And if *Harris* and *Rabinowitz* are not to be overruled, it is better to continue to apply these restrictions than to abandon them, for this would be tantamount to abandoning the requirement that, as a general rule, it is a magistrate who is to authorize a search, not a police officer. But we respectfully urge that the soundest course of action would be to overrule *Harris* and *Rabinowitz*.

IV.

Conclusion.

For the foregoing reasons the judgment of the District Court of Appeal of California should be reversed.

Respectfully submitted,

William H. Dempsey, Jr.
734 15th Street, N. W.
Washington, D. C.
Attorney for Petitioner
(Appointed by this Court)

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1963

No. 209

JOSEPH LYLE STONER, *Petitioner,*

vs.

CALIFORNIA, *Respondent.*

On Writ of Certiorari to the District Court of Appeal of California, Second Appellate District

BRIEF FOR RESPONDENT

STANLEY MOSK,
Attorney General of the State of California,
ARLO E. SMITH,
Chief Assistant Attorney General,
6000 State Building,
San Francisco 2, California,
Attorneys for Respondent.

ALBERT W. HARRIS, JR.,
Deputy Attorney General,
MICHAEL J. PHELAN,
Deputy Attorney General,
Of Counsel.

Subject Index

III

Table of Authorities Cited

Codes

Constitutions

Rules

Texts

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1963

No. 209

JOSEPH LYLE STONER, *Petitioner,*

vs.

CALIFORNIA, *Respondent.*

On Writ of Certiorari to the District Court of Appeal of California, Second Appellate District

BRIEF FOR RESPONDENT

OPINIONS BELOW

The decision and opinion of the District Court of Appeal of the State of California for the Second Appellate District is reported in 205 Cal.App.2d 108, and in 22 Cal.Rptr. 718. It is also found at page 121 of the Transcript of Record. The order of the California Supreme Court denying a hearing without opinion is noted in 205 Cal.App.2d 116.

JURISDICTION

On August 22, 1962, the California Supreme Court denied a hearing after petition from the decision of of the California District Court of Appeal for the Second Appellate District (R. 130). The jurisdiction of this Court was invoked under 28 U.S.C. 1257 (3). Petition for a Writ of Certiorari to the District Court of Appeal, Second Appellate District, was granted on June 17, 1963. "Review is limited to the question of whether evidence was admitted which had been obtained by an unlawful search and seizure." 374 U.S. 826.

QUESTION PRESENTED

Whether the Fourteenth Amendment to the United States Constitution compelled the exclusion of evidence received in the state criminal prosecution of petitioner for armed robbery, where this evidence was found by police officers during a search of petitioner's transient hotel room in his absence and with the consent of the hotel clerk.

STATEMENT OF THE CASE

Proceedings In The State Courts.

On November 28, 1960, an amended Information charging petitioner with armed robbery occurring on or about the 25th day of October, 1960, was filed by the District Attorney for the County of Los Angeles, State of California. Petitioner was also charged with

two prior felony convictions: (1) conviction of murder on December 10, 1941, and (2) conviction of the crime of grand theft on December 20, 1943 (R. 2-3).

After two Deputy Public Defenders of Los Angeles County were appointed to represent petitioner (R. 4, 5), and both were relieved of the appointment by the Court upon motion of petitioner, Frank Duncan, Esq., was appointed as petitioner's attorney (R. 7). Petitioner entered a plea of not guilty and denied commission of the prior offenses (R. 5).

The case came to trial on March 27, 1961 before a jury. On March 29, 1961, the jury returned a verdict of guilty as charged (R. 8-9). Prior to the trial of the cause, petitioner admitted commission of the prior offenses charged (R. 8, 13).

On April 6, 1961, petitioner's motion for a new trial was denied and he was sentenced to imprisonment in the State Prison for the term prescribed by law. The Court also found petitioner to be a habitual criminal (R. 10, 120).

The District Court of Appeal of the State of California, Second Appellate District, Division Two, affirmed the judgment of conviction on June 26, 1962 (R. 130). The Supreme Court of the State of California, sitting in bank, denied petitioner's application for a hearing on August 24, 1962 (R. 130).

STATEMENT OF THE FACTS

The Robbery.

On October 25, 1960 at approximately 8:00 P.M., a Mr. David Greely was working as a night clerk in the Budget Town Market in Monrovia, California (R. 16). At this time, two men, subsequently identified as petitioner and one Peter Schales, then 22 years old (R. 48), entered the store, selected a pizza and brought it up to the check stand attended by Mr. Greely (R. 16, 46-47). After Greely opened the cash register, petitioner drew a .45 caliber automatic pistol and told him to put all of the money in a paper sack. Greely then placed an estimated $1,000.00 in cash and checks in a 12-pound paper sack. About $800.00 of this was cash (R. 21, 48). Petitioner then directed Greely to lie down on the floor (R. 17).

About this time, Mrs. Donna May Ray, who also worked in the store, came out from a back room where she had been working (R. 28). When she noticed petitioner standing there with a gun, he told her to go behind the counter with Mr. Greely, the clerk (R. 29).

After petitioner and Peter Schales left the Budget Town Market, they split up the loot with each getting approximately $400.00 of the cash. The checks were thrown out somewhere along the route the two robbers took after they left the market (R. 48, 94).

In addition to the testimony of the two victims, Peter Schales, petitioner's partner in the commission of the robbery, testified for the prosecution concerning their plans to rob the market and the conduct of the

robbery (R. 43-60). And, over objection that it was involuntary (R. 92), testimony was received concerning petitioner's confession (R. 93-94).

Petitioner was described to the police as being 35 to 40 years of age, 5' 10" in height, wearing a gray shirt, a gray sweater, a gray hat, and horn-rimmed glasses (R. 21).

The Arrest And Search.

During the investigation at the scene of the crime, the manager of the store turned over a checkbook to Detective Gilliland of the Monrovia Police Department which had been found near the scene of the robbery. Subsequently, it was determined that it belonged to petitioner (R. 68-69). The check stubs indicated that two checks had been written to the Mayfair Hotel. The Mayfair was described as a "transient type of hotel" (R. 68). On one check stub, the notation "for rent" was written. Gilliland then checked with the Pomona Police Department and learned that petitioner had been convicted of murder and robbery (R. 70). He obtained a photograph or mugshot of petitioner and showed it to the victims. Gilliland reported that the victims ". . . both stated that this looked like the man who held the gun, however, they would like to see him in person." (R. 71).

Detective Gilliland's testimony described the ensuing investigation as follows:

> "A. The 27th of October, 1960. Mr. Collins and myself proceeded to Pomona. We made contact with the Pomona Police Department, two

detectives, Detective Oliver and Rowland, and discussed the Mayfair Hotel for a short time, and then they stated that they would go with us to the Mayfair Hotel since we were not too familiar with it. And two different police cars went to the Mayfair Hotel, parked on the City parking lot directly east of the hotel, went into the lobby, the four of us. We approached the desk, the night clerk, and asked him if [fol. 96] there was a party by the name of Joey L. Stoner living at the hotel. He checked his records and stated 'Yes, there is.' And we asked him what room he was in. He stated he was in Room 404 but he was out at this time.

We asked him how he knew that he was out. He stated that the hotel regulations required that the key to the room would be placed in the mail box each time they left the hotel. The key was in the mail box, that he therefore knew he was out of the room.

We asked him if he would give us permission to enter the room, explaining our reasons for this.

Q. What reasons did you explain to the clerk?

A. We explained that we were there to make an arrest of a man who had possibly committed a robbery in the City of Monrovia, and that we were concerned about the fact that he had a weapon. He stated 'In this case, I will be more than happy to give you permission and I will take you directly to the room.'

Q. Is that what the clerk told you?

A. Yes, sir.

Q. What else happened?

A. We left one detective in the lobby, and Detective Oliver, Officer Collins, and myself, along

with the night clerk, got on the elevator and proceeded to the fourth floor, and went to Room 404. The night clerk placed a [fol. 97] key in the lock, unlocked the door, and says, 'Be my guest.'

Q. What did you do?

A. We entered the room, and the first thing that was observed was a pair of horn-rimmed glasses laying on a desk in the northeast corner of the room. I picked the glasses up and looked at them and noted that they answered the description of the glasses described by one of the victims." (R. 71-72).

The search of the room then disclosed the following items which were received in evidence: a .45 caliber automatic pistol with a clip and several cartridges, a pair of horn-rimmed glasses, and a gray coat.

Petitioner was arrested at approximately noon on Saturday, October 29, 1960, in the City of Las Vegas, Nevada (R. 79).

The Defense.

Petitioner's defense was essentially one of alibi. Two witnesses testified that on the night and at the time of the robbery, petitioner was with them at a residence (R. 101-02; 109-10). Petitioner did not testify to his whereabouts on the night of the robbery. There was also evidence that prior to the robbery, on October 21, 1960, petitioner applied for and was given a loan for $170.00, allegedly to pay various bills which had accumulated due to the separation from his wife (R. 115-16).

SUMMARY OF RESPONDENT'S ARGUMENT

At the outset it should be made clear that respondent does not attempt to justify the search conducted in this case as incident to petitioner's arrest. *Agnello v. United States*, 269 U.S. 20 (1925). The search of the hotel room was not incidental to the arrest, ". . . for it was at a distance from the place thereof and was not contemporaneous therewith." *People v. King*, 60 A.C. 259, 262, 32 Cal.Rptr. 825, 384 P.2d 153 (1963); *People v. Gorg*, 45 Cal.2d 776, 781, 291 P.2d 469 (1955); *Tomkins v. Superior Court*, 59 Cal.2d 65, 67, 27 Cal.Rptr. 889, 378 P.2d 113 (1963); *Castenada v. Superior Court*, 59 Cal.2d 439, 442, 30 Cal.Rptr. 1, 380 P.2d 641 (1963); *People v. Haven*, 59 Cal.2d 713, 719, 31 Cal.Rptr. 47, 381 P.2d 927 (1963). We have consistently maintained the view, in the California District Court of Appeal, and now in this Court, that the search and seizure here in question should be tested by the doctrine of consent to search rather than the doctrine of a search incident to a lawful arrest.

We submit that the search and seizure was lawful because: (1) it was with the consent of the hotel clerk who had actual authority to consent to the search because the hotel retained the dominion and control over the room assigned to petitioner; and (2) the officers conducting the search were justified in believing in good faith that the hotel clerk had authority to consent to the search.

Moreover, the attempt to label the objects seized as "mere evidence" in contradistinction to "means"

or "instrumentalities," does not render the search and seizure unlawful. For we believe that these artificial distinctions should not be considered a part of the test of "reasonableness" applicable to the States by the Fourteenth Amendment. But even if such sophistry is deemed a part of the test which the States must follow, the items of evidence here received in evidence were worn or used in the commission of the robbery and, thus, must be considered to be "means" or "instrumentalities" of the crime.

Finally, even if the search was unlawful or if the items seized are deemed mere "evidence," and hence impermissible objects of a search, their admission in evidence constitutes "harmless error."

ARGUMENT

I

THE SEARCH OF PETITIONER'S HOTEL ROOM WAS LAWFUL BECAUSE IT WAS CONDUCTED WITH THE CONSENT OF THE HOTEL CLERK WHO WAS CLOTHED WITH BOTH ACTUAL AND OSTENSIBLE AUTHORITY TO CONSENT TO THE SEARCH.

It is settled that a search and taking of evidence, freely consented to by one who has the authority to give such consent, is not unreasonable under the Fourth Amendment. *Abel v. United States*, 362 U.S. 217, 241 (1960); *Davis v. United States*, 328 U.S. 582, 593-94 (1945); *Zap v. United States*, 328 U.S. 624, 628 (1945); *Feguer v. United States*, 302 F.2d 214, 248-49 (8th Cir. 1962) *cert. den.* 371 U.S. 872; *People*

v. Michael, 45 Cal.2d 751, 753, 290 P.2d 852 (1955). Thus, in the *Abel* case, a search of a hotel room was upheld where petitioner had vacated a room and "[t]he hotel then had the exclusive right to its possession, and the hotel management freely gave its consent that the search be made." 362 U.S. at 241. And in *Feguer v. United States*, the search of a room with the consent of the landlord was upheld though the tenant's term had not yet expired where the tenant left the room taking all of his belongings with him. 302 F.2d at 249.

The pivotal question in this case is whether or not there was actual or apparent authority on the part of the hotel clerk to consent to the search of petitioner's hotel room.

A. The Hotel Clerk Had Actual Authority To Consent To The Search.

The record establishes that the hotel retained dominion and control over the rooms it let. The hotel was a "transient type of hotel," instead of a place where persons maintain permanent residence (R. 68). In addition to this fact, the hotel regulations required that the key to a guest's assigned room ". . . be placed in the mail box each time they left the hotel" (R. 71). Under California property law, the hotel management retained control of the rooms, halls, lobbies and other portions of the hotel. *Fox v. Windemere Hotel Apart. Co.*, 30 Cal.App. 162, 164-65, 157 Pac. 820 (1916); *Roberts v. Casey*, 36 Cal.App.2d Supp. 767, 771-72, 93 P.2d 654 (1939); *People v. Vaughn*, 65

Cal.App.2d Supp. 844, 150 P.2d 964 (1944). Thus, the hotel has a right of access and control over every part of the hotel, even though lodgers such as petitioner are given a license to use separate parts. And the hotel plainly has a right to make and enforce any reasonable regulations necessary for the protection of other guests. The right of privacy is reasonably subject to this power. Here the hotel clerk had good reason to fear for the safety of other guests when the officers told him of the robbery and the use of a gun. Indeed, his response to these proffered reasons for the officers' request to enter the room was, "In this case, I will be more than happy to give you permission and I will take you directly to the room." (R. 72).

We submit, therefore, that this record supports the conclusion that the hotel clerk had actual authority to admit the officers to petitioner's room to search.

B. The Hotel Clerk Had Apparent Authority To Consent To The Search.

The rule is well settled in California that officers may conduct a search of a defendant's dwelling place upon the authority and consent of a third person, where there is evidence that the officers entertain a good faith belief based upon sufficient facts that the person consenting to the search had the authority to do so. *People v. Gorg, supra,* 45 Cal.2d 776, 291 P.2d 469 (1955); *People v. Caritativo,* 46 Cal.2d 68, 292 P.2d 513 (1955) *cert. den.* 351 U.S. 972; *People v. Burke,* 208 Cal.App.2d 149, 24 Cal.Rptr. 912 (1962); *People v. Crayton,* 174 Cal.App.2d 267, 344 P.2d 627 (1959);

People v. Ambrose, 155 Cal.App.2d 513, 318 P.2d 181 (1957); *People v. Shepard*, 212 Cal.App.2d 697, 28 Cal.Rptr. 297 (1963); *People v. Kelly*, 195 Cal.App.2d 699, 16 Cal.Rptr. 177 (1961). We submit that in this case the officers had ample information upon which to form a good faith belief that the hotel clerk had the authority to consent to the search.

This Court has recently stated, "[t]he states are not . . . precluded from developing workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the states, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures. . . ." *Ker v. California*, 374 U.S. 23, 34 (1963). We submit that this "workable rule" does not violate the basic constitutional command of the Fourth Amendment that a search be reasonable. The "reasonableness" of this rule may be tested by considering the policy bases underlying the Fourth Amendment protection.

First, the rule certainly does not offend the policy of deterring lawless police activity, because under the test, the officers must believe on sufficient facts and in good faith that there is authority to consent. Plainly, this test does not encourage or tolerate unlawful police conduct.

Second, the policy of protecting the right of privacy by the basic standard of "reasonableness" is not impaired by this California rule. For it is at once clear that the right of privacy is not absolute; the right is subject to such invasions as meet the standard of

"reasonable." Thus, we allow a search of a dwelling incident to a lawful arrest without warrant. *Agnello v. United States, supra,* 269 U.S. 20 (1925); *Marron v. United States,* 275 U.S. 192 (1927). In these cases, the threshold standard allowing this invasion of privacy is "reasonable cause to believe a felony has been committed." Additionally, of course, the search must be contemporaneous and the premises contiguous to the place of arrest. A search under these circumstances then is not one which can be conducted in the unfettered discretion of the law enforcement officer. Whether there is a permissible invasion of the right of privacy, *i.e.,* a "reasonable" search under the Fourth Amendment, is tested initially by the officer's good faith belief based on probable cause that a felony has been committed in his presence.

Similarly, the California rule allowing a search where there is a good faith belief that the person consenting to a search has the authority to consent, while it allows an invasion of privacy, does not allow it in the unfettered discretion of the police officer.

Finally, it is an altogether reasonable search and seizure rule which turns, not upon the niceties of property law which the law enforcement officer cannot be expected to know and understand, but on facts and circumstances which indicate to the reasonable person that one purporting to grant consent to search has the authority to do so.

Respondent submits therefore that this "workable rule" satisfies the fundamental criterion of the Fourth Amendment that a search be reasonable.

The rule just discussed is appropriately applied to this case. The police officers asked the night clerk if he would give them permission to enter petitioner's room. They explained to him that they were there to make an arrest of a man who had possibly committed a robbery and that they were concerned that he had a weapon (R. 72). The night clerk answered, "In this case, I will be more than happy to give you permission and I will take you directly to the room." (R. 72). After conducting the officers to petitioner's room, the night clerk placed a key in the lock, unlocked the door, and said, "Be my guest." (R. 72). The night clerk thus expressed an implied authority to consent to the entry, and it may reasonably be found that the officers who searched petitioner's room relied upon the night clerk's voluntary and affirmative expressions of consent to conclude that the management did, in fact, have authority to let them in. Moreover, the officers were aware of the fact that the hotel regulations required petitioner to leave the key to his room with the clerk when he left the hotel (R. 72). The officers' knowledge of this fact provides further justification for their reliance on his apparent authority to enter petitioner's room.

It is therefore submitted, that the search conducted in this case was lawful because of the actual and apparent authority of the hotel night clerk to give such consent.

II

THE OBJECTS SEIZED DURING THE SEARCH WERE USED OR WORN BY PETITIONER DURING THE COMMISSION OF THE ROBBERY AND WERE PERMISSIBLE OBJECTS OF A SEARCH AND SEIZURE.

A. The "Mere Evidence" Rule Does Not And Should Not Apply To The States.

Petitioner suggests that one of the factors which indicates that the search and seizure conducted in this case was unreasonable under the Fourth Amendment, was that the horn-rimmed glasses and the gray coat were "merely evidentiary" and hence improper objects of a search. *Gouled v. United States*, 255 U.S. 298 (1921). Implicit in this argument is the view that this rule, though not heretofore applied to the States, is essential to a "concept of ordered liberty" and hence is applicable to the States through the Fourteenth Amendment. We submit that the rule does not rise to this level of importance and that it should not be extended to the States.

It is true that ". . . the standard of reasonableness is the same under the Fourth and Fourteenth Amendments", *Ker v. California, supra*, 374 U.S. 23, 33 (1963), and that both federal and state officers must respect the "same fundamental criteria," *Mapp v. Ohio*, 367 U.S. 643, 658 (1961), laid down by the Fourth Amendment. *Ker v. California, supra.* But we believe that the "mere evidence" rule is not, and should not be, part of the constitutional test of reasonableness.

This rule is solely of federal origin and appears to have developed out of this Court's "'. . . exercise

of its supervisory authority over the administration of criminal justice in the federal courts. . . .'" *Ker v. California, supra*, 374 U.S. at 31, quoting from *McNabb v. United States*, 318 U.S. 332, 341 (1943). Its application to every day law enforcement in the States would seriously hamper the effective enforcement of penal laws in the States. Few indeed are the cases where there is not some item of physical evidence, which has been seized either by warrant, incidental search, or a search by consent and has been introduced in the trial of the case because it is a vital link between the crime and the criminal, which could not be denominated "mere evidence." Are not, for example, finger prints, blood stains, hair, cloth fibers and similar objects "mere evidence," rather than "means" or "instrumentalities?" Yet such scientific evidence is singularly reliable and where it is lawfully obtained, it would be patently absurd to exclude it upon the ground that it is "merely evidentiary."

In earlier times such scientific evidence was not recognized as having probative value and hence it was not likely to be the object of a search. Aside from books and papers, which might or might not be "means and instrumentalities," it may be surmised that seldom was there occasion to search for objects other than "means," "instrumentalities," "contraband" or the "fruits" of crime. Thus, what appears as the practice of former times, has jelled into an inflexible rule of law which cannot be justified today.

The distinctions between items which are "merely evidentiary" and those which are "means" or "instrumentalities" of crime are indeed elusive, if not altogether illusory. There has been great difficulty in applying this rule to specific fact situations, and the cases are confused and some totally inconsistent. Compare *Gouled v. United States, supra,* with *Zap v. United States, supra,* 328 U.S. 624 (1945), and *United States v. Lefkowitz,* 285 U.S. 452 (1931) with *Marron v. United States, supra,* 275 U.S. 192 (1927). Professor Kamisar has noted that ". . . the area is so cluttered with inconsistencies and uncertainties as to permit much freedom of movement. While 'a search for an object of purely evidentiary significance' may be taboo, objects have and will continue to be found to possess a bit more than 'purely evidentiary significance' just about whenever a resourceful judge wants to so find.". Kamisar, *The Wiretapping-Eavesdropping Problem: A Professor's View,* 44 Minn. L. Rev. 891, 917 (1960), (footnotes omitted).

The Second Circuit in *Matthews v. Correa,* 135 F. 2d 534, 537 (2nd Cir. 1943) also commented, somewhat in despair, that "[t]he line between fruit of the crime itself and mere evidence thereof may be narrow; perhaps this turns more on the good faith of the search than the actual distinction between the matters turned up."

Additionally, it has been noted that the rule is without a substantial policy basis. See Comment, *Limitations on Seizure of "Evidentiary" Objects—A Rule*

in Search of A Reason, 20 U. Chi. L. Rev. 319 (1953). The rule appears to be an unwarranted extension of the rule prohibiting exploratory searches conducted to find some evidence against one suspected of crime. Many cases can adequately be explained on this ground. The Fourth Amendment itself does not mention a restriction on the seizure of "mere evidence." Even as to search warrants, the constitutional language is not phrased in terms of restricting the kind and character of items seized, but in terms of the particularity with which the items sought must be described. The Amendment states that ". . . no warrants shall issue, but upon probable cause . . . and *particularly describing the* place to be searched, and the persons or *things to be seized.*" (Emphasis added.) The plain effect of this requirement is not to forbid the search for some categories of objects, but to proscribe the rummaging and exploratory search. An exploratory search offends the canon of "reasonableness" under any view and must of course be prohibited. We believe this latter rule provides sufficient protection against over-zealous law enforcement officers.

California has adopted a search warrant rule which allows for the search for "mere evidence," yet does not condone the exploratory search. A search warrant will issue for items which constitute ". . . evidence which tends to show a felony has been committed, or tends to show that a particular person has committed a felony." Cal. Pen. Code § 1524, subd. 4.

We submit that such a search pursuant to a warrant and the search by consent in this case do not

contravene the "fundamental criteria" of the Fourth Amendment that a search be reasonable.

Again, the "mere evidence" rule is not and should not be a constitutional command of the Fourth Amendment applicable to the States through the Fourteenth Amendment.

But even if the rule against seizure of "merely evidentiary" objects is applicable to the States, it should not apply to a case such as this where there is consent to search. For a freely given consent is a waiver of any objection that the search and seizure is "unreasonable" under the Fourth Amendment. *Zap v. United States, supra,* 328 U.S. 624, 628 (1945). This concept of limiting the kind of items which are subject to seizure would appear to have relevance in this case only insofar as it can be said that a search consented to becomes unreasonable because it exceeds the scope of the consent granted. The question is not whether the character of the items is such as to indicate the reasonableness of the search, but whether the items are of such a nature that the officers could seize them when they were discovered during the course of a search consented to by one who has the authority to so consent, but who, it may be conceded, has no authority to consent to seizure of personal property belonging to another.

B. The Objects Seized In This Case Were Not "Mere Evidence".

Whether viewed as a question of the scope of the consent to search and seize, or as a factor indicating "reasonableness" of a search and seizure, we believe

the "merely evidentiary" rule is not properly invoked in this case. For under either approach, the objects received in evidence in this case were not "merely evidentiary" but must be deemed "means" or "instrumentalities" of the robbery.

First, it should be noted that fairly implied in the officers' testimony concerning the search, is that after learning the petitioner was not likely to be found in his room, they went to his room to search for the weapon he was reported to have used in the commission of the robbery (see R. 72). The possession of a gun by one previously convicted of a felony is itself a felony in California. Physical possession is not essential. The crime can be committed if the gun is under "custody or control" of an ex-felon. Cal. Pen. Code § 12021. The officers knew that petitioner had been convicted of a felony (R. 70), and further that he had been identified as the robber brandishing a .45 caliber automatic during the commission of the robbery. Plainly then the gun was a permissible object of a search and seizure. Moreover, it may reasonably be concluded that the "systematic search" (R. 72) was conducted to find this weapon, and thus the search was not a mere rummaging or exploratory search.

In the course of the search for this weapon, the officers were not required to overlook other articles of evidentiary value and subject to seizure which were turned up. "When an article subject to lawful seizure properly comes into an officer's possession in the course of a lawful search, it would be entirely with-

out reason to say that he must return it because it was not one of the things it was his business to look *for." Abel v. United States, supra,* 362 U.S. 217, 238 (1947). Thus, if they were properly subject to seizure as "means" or "instrumentalities" during a lawful search, the glasses and hat were lawfully seized even though the officers' purpose in searching was to find the weapon used by petitioner.

Whatever may be said about the classification of other articles of evidence, it is plainly apparent that items of apparel, here a pair of horn-rimmed glasses (with paint spots across the front of them (R. 26)) and a gray coat, worn in conjunction with a hat with the brim turned down (R. 61), during the commission of an armed robbery, are within the classification of "means" or "instrumentalities." Petitioner concludes that such innocent items as these could not be deemed a disguise. But while they may not have the concealing effect of a stocking mask or a halloween costume, they were, nevertheless, instrumental in obscuring petitioner's features so as to make identification more difficult. This is demonstrated by the fact that petitioner's apparently distinctive hair and bushy eyebrows (R. 23, 39-40), were not perceived by the two victims.

We submit, therefore, that these items of apparel, worn during the commission of the robbery, were properly seized.

III

IF THE ITEMS RECEIVED IN EVIDENCE ARE CONSIDERED TO HAVE BEEN OBTAINED AS THE RESULT OF AN UNLAWFUL SEARCH AND SEIZURE, THE PREJUDICIAL ERROR RULE SHOULD APPLY.

A. Application Of California's Rule Of Prejudicial Error To This Case Does Not Violate The Fourteenth Amendment.

Since voluntarily adopting the "exclusionary rule" in 1955, *People v. Cahan,* 44 Cal.2d 434, 282 P.2d 905, California's appellate courts have decided several hundred cases involving the legality of searches and seizures and the admissibility of evidence obtained by the searches. In reviewing all of these cases, our courts have applied, where necessary, and as commanded by the California Constitution, the prejudicial error rule. We have followed a test similar to that which this Court has applied to the review of federal cases. See 28 U.S.C. § 2111; Fed. R. Crim. P. 52(a); *Kotteakos v. United States,* 328 U.S. 750, 764-65 (1945).

Article VI, section 4½, was added to the California Constitution by amendment in 1914 and commands that the California appellate courts not reverse a case on the ground of ". . . the improper admission or rejection of evidence . . ., unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

California should be allowed to apply this standard of harmless error to this case, unless its application conflicts with the Fourteenth Amendment. The majority of this Court has not passed on the question

of whether ". . . the erroneous admission of evidence obtained by an illegal search and seizure can ever be subject to the normal rules of 'harmless error' . . . ." *Fahy v. Connecticut*, 84 S.Ct. 229, 230 (1963). But four members of this Court have concluded that a standard which ". . . required a determination that exclusion of the unconstitutional evidence could not have changed the outcome of the trial," was not repugnant to the Fourteenth Amendment. *Id.* at 234 (dissenting opinion). The California standard is phrased in like terms, and can, we submit, constitutionally be applied to this case.

The reasons for the application of the harmless-error rule to cases where illegally obtained evidence has been received in a criminal prosecution have been well stated by Mr. Justice Harlan and Mr. Justice Traynor. In *Fahy v. Connecticut, supra,* Mr. Justice Harlan writes:

> "It is obvious that there is no necessary connection between the fact that evidence was unconstitutionally seized and the degree of harm caused by its admission. The question of harmless error turns not on the reasons for inadmissibility but on the effect of the evidence in the context of a particular case. Erroneously admitted 'constitutional' evidence may often be more prejudicial than erroneously admitted 'unconstitutional' evidence. Since the harmless-error rule plainly affords no shield under which prosecutors might use damaging evidence, unconstitutionally obtained, to secure a conviction, there is no danger that application of the rule will undermine the prophylactic function of the rule of

inadmissibility." 84 S.Ct. at 234 (dissenting opinion).

In *People v. Parham*, 60 A.C. 333, 33 Cal.Rptr. 497 (1963), Mr. Justice Traynor states:

"Unlike involuntary confessions, other illegally obtained evidence may be . . . only a relatively insignificant part of the total evidence and have no effect on the outcome of the trial. To require automatic reversal because of its admission is to lose sight of the basic purpose of the exclusionary rule to deter unconstitutional methods of law enforcement. . . . Unless we were to take the unprecedented step of holding that the state must be penalized for violating a defendant's constitutional rights in securing evidence by conferring an immunity upon him . . ., we must consider the deterrent effect of the exclusionary rule not as a penalty but as derived from the principle that the state must not profit from its own wrong. . . . The state does not so profit when erroneously admitted evidence does not affect the result of the trial. A reversal for the admission for illegally obtained evidence without regard for prejudice when there is compelling legally obtained evidence of guilt constitutes nothing more than a penalty, not for the officers' illegal conduct in securing the evidence, but solely for the prosecutor's blunder in offering it and the trial court's error in admitting it. To require automatic reversal for such harmless error could not help but generate pressure to find that the unreasonable police conduct was lawful after all and thereby to undermine constitutional standards of police conduct to avoid needless re-trial. . . . An exclusionary rule so rigidly administered

could thereby defeat itself." 60 A.C. at 340-41, 33 Cal.Rptr. at 501.

We submit that these persuasive reasons compel the conclusion that the prejudicial error rule does not offend the Fourteenth Amendment and that it should be applied to this and like cases. Where fairly and conscientiously applied, this rule does not deny an appellant life, liberty or property without due process of law.

B. Petitioner Was Not Prejudiced By The Introduction Of The Disputed Items In The Present Case.

The facts of the present case present a classical example of the propriety of the harmless-error rule. In the present case, the evidence complained of as being improperly admitted consisted of a gun, cartridges and clip, a coat and a pair of glasses. That none of these items had any serious impact on the jury is plain from a review of the entire record.

There was a dispute among the prosecution witnesses as to whether or not the coat presented in court was in fact the coat worn during the crime. Two employees of the Budget Town Market testified that this *appeared to be* the coat petitioner had worn (R. 26, 30). However, petitioner's accomplice testified that it was not the coat worn during the robbery (R. 48).

Another item was a pair of glasses found in the defendant's room (R. 71). The impact, if any, these had upon the jury appears exceedingly speculative, but certainly they were of little consequence in the

case. Again, these were only identified as being *similar to* ones worn by petitioner during the robbery (R. 26, 31).

The third item consisted of a gun, with cartridges and a clip which were found in defendant's room (R. 73, 98-99). Although at first view, the impact of a gun upon a jury would appear to be fairly serious, it should be remembered that one of the store employees testified only that this gun *was similar* to that used in the robbery. He did not identify it as *the* gun used in the robbery (R. 17). Further, while the second employee testified that it was the gun (R. 29), her identification of it was based only on a view of the muzzle end and was effectively discredited by defense counsel on cross-examination (R. 31-32). Moreover, petitioner freely admitted, as a part of his confession, that this was the gun used in the robbery (R. 94). Thus, independent of the introduction of this gun in evidence, there was evidence that petitioner used a gun during the robbery. Indeed, the prosecution could have chosen to use a similar gun for demonstrative purposes before the jury. *People v. Jordan,* 188 Cal.App.2d 456, 10 Cal.Rptr. 495 (1961). The testimony of the prosecution witnesses in such a case would have been that the gun admitted for demonstration purposes *was similar to* the gun used by the defendant. This would have had the same impact on the jury as the admission of the gun here introduced.

This same argument is also applicable to the glasses. Similar glasses for the purpose of demon-

stration could have been presented by the prosecution. The testimony of the prosecution witnesses that they were similar to those used in the robbery would have been proper.

Furthermore, neither the gun, the coat, nor the glasses were in any sense a necessary, or even cogent, link between the defendant and the crime. The prosecution's case was complete without them.

The testimony of the prosecution witnesses produced to establish petitioner's participation in the robbery was overwhelming. Two employees of the Budget Town Market testified as to the robbery, identifying petitioner in open court as the robber (R. 16, 28). In addition to the positive identification of the petitioner in court before the jury, the same witnesses had identified him as the robber when shown pictures of him by the police. This followed the discovery in the store parking lot of the checkbook imprinted with the name "Joey L. Stoner" (R. 38, 70-71). One of the witnesses had also given the officers a good description of petitioner (R. 21). Finally, these same witnesses identified petitioner in a lineup and, indeed, were even able to describe some of the other persons in the lineup with him and recall how they differed (R. 22-23, 36-37).

Added to this positive and repeatedly clear identification of petitioner, the prosecution produced his accomplice, Peter Schales, who had entered a plea of guilty to this same robbery. Schales testified that he had planned and participated in the robbery with petitioner. He described the manner of conducting

the robbery, including the fact that petitioner held the gun on the victims (R. 47). Added to all of this evidence, the prosecution had the voluntary confession of petitioner admitting his participation in the robbery.

Thus, the prosecution had an overwhelming case against petitioner, and it is plain that the admissibility of the disputed items was merely cumulative. Comparing all of this direct testimony with the mere demonstrative character of the items taken from the hotel room, when similar demonstrative items could have been placed before the jury, it is evident that it cannot be said that ". . . a result more favorable to the appealing party would have been reached in the absence of the error." *People v. Watson,* 46 Cal.2d 818, 836, 299 P.2d 243 (1956).

We submit that the application of this test compels the affirmance of the judgment of conviction in petitioner's case.

C. Should This Court Hold The Prejudicial Error Rule Applicable To This Case, The Cause Should Be Remanded To The California District Court Of Appeal For The Determination Of The Prejudicial Effect, Subject To Further Review By This Court.

Since the evidence in this case was held to have been lawfully seized, California has not had occasion to apply its harmless-error rules. In the event that this Court determines the evidence to have been unlawfully obtained, respondent urges that the case be remanded to the California District Court of Appeal in order that the issue of prejudice can be resolved according to California standards of harmless error.

CONCLUSION

For the foregoing reasons, respondent respectfully urges that the judgment of conviction in petitioner's case be affirmed.

Dated, San Francisco, California,
January 29, 1964.

STANLEY MOSK,
Attorney General of the State of California,
ARLO E. SMITH,
Chief Assistant Attorney General,
Attorneys for Respondent.

ALBERT W. HARRIS, JR.,
Deputy Attorney General,
MICHAEL J. PHELAN,
Deputy Attorney General,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 209

JOSEPH LYLE STONER, *Petitioner,*

v.

CALIFORNIA, *Respondent.*

REPLY BRIEF FOR PETITIONER

WILLIAM H. DEMPSEY, JR.
734 Fifteenth Street, N.W.
Washington, D. C.
Attorney for Petitioner
(Appointed by this Court)

INDEX

Citations

Cases:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 209

JOSEPH LYLE STONER, *Petitioner,*

v.

CALIFORNIA, *Respondent.*

REPLY BRIEF FOR PETITIONER

Preliminary Statement

In its brief, the State concedes that the holding below cannot be reconciled with *Agnello* v. *United States*, 269 U.S. 20 (1925)—*i.e.*, it concedes that the search of petitioner's hotel room and the seizure of his possessions were not incident to his arrest (Br. p. 8). However, the State claims that petitioner's conviction should nevertheless be affirmed for reasons which the court below did not see fit to endorse.

First, the State contends that the police could lawfully conduct a "systematic search" (R. 72) of petitioner's room in his absence, without a warrant and without his permission, because a hotel clerk unlocked the room and said, "Be my guest." (Br. pp. 9-14.) Second, the State contends that, having searched the room with such "consent,"

the police could lawfully seize, not only a gun, but also petitioner's glasses and clothing as "instrumentalities" of crime, or in any event as evidence (Br. pp. 15-21). Third, the State contends that, regardless of the legality of the search and the seizure, the use of the property seized as evidence at petitioner's trial was in fact mere "harmless error." (Br. pp. 22-28.)

The State is wrong on each count.

1. The fact that the hotel clerk let the police into petitioner's room did not justify the search. Since it was petitioner's privacy that was at stake and not the clerk's, the relevant constitutional protections were not the clerk's to waive. Accordingly, the clerk had no power to "consent" to the search—either under California law or under the Fourteenth Amendment—and the police could not reasonably suppose that he did. *United States* v. *Jeffers*, 342 U.S. 48 (1951); *Lustig* v. *United States*, 338 U.S. 74 (1949); *Chapman* v. *United States*, 365 U.S. 610 (1961); *People* v. *Burke*, 208 Cal. App. 2d 149, 24 Cal. Rptr. 912 (1962).

2. Moreover, even if the entry and search had been lawful, the seizure could not be defended. Petitioner's glasses and clothing were neither contraband nor the fruits or instrumentalities of crime, articles traditionally subject to seizure because their possessor has no right to them. On the contrary, the glasses and clothing were lawfully in petitioner's possession; they were seized solely because the police thought they might be useful as evidence. This Court has held repeatedly that such seizures are invalid even when pursuant to warrants. *E.g.*, *Boyd* v. *United States*, 116 U.S. 616 (1886). The constitutional considerations underlying such decisions are all the more compelling when, as in this case, the seizure was without a warrant.

3. Finally—although the use of unconstitutionally ob-

tained evidence should require reversal without any special showing of prejudice, *Williams* v. *United States*, 263 F.2d 487, 490 (D.C. Cir. 1959); *Honig* v. *United States*, 208 F.2d 916, 921 (8th Cir. 1953)—there can be no doubt in this case that "there is a reasonable possibility that the evidence . . . might have contributed to the conviction." *Fahy* v. *Connecticut*, 375 U.S. 85, 86-87 (1963). Accordingly, the use of the evidence at petitioner's trial was not "harmless error."

We discuss each of these issues in greater detail below.

I. The Search Was Unconstitutional Notwithstanding the Fact that a Hotel Clerk Let the Police Into Petitioner's Room.

The State in effect concedes that the search here at issue, if conducted without consent, was unconstitutional. Moreover, the State does not (nor could it) argue that petitioner consented. However, the State argues here, as it did below, that the "consent" by the hotel clerk suffices because of certain alleged local law doctrines respecting the actual or apparent authority of a clerk to give such consent.

While the lower court erred in grounding its decision upon the "incident to arrest" doctrine, it would have compounded the error by accepting this "consent" argument, for the State's theory is flatly opposed to this Court's decisions, is without support in California law, and is unsound in principle.

To take this Court's decisions first, the State's argument wholly ignores three dispositive cases cited in our opening brief—*United States* v. *Jeffers*, 342 U.S. 48 (1951), *Lustig* v. *United States*, 338 U.S. 74 (1949), and *Chapman* v. *United States*, 365 U.S. 610 (1961).

In *Jeffers*, the assistant manager of a hotel allowed police to enter and search a room in the occupants' absence with-

out a warrant. This Court held the search unconstitutional both as to the occupants and as to their nephew whose narcotics the police had seized. The Court noted that the law "does not prohibit every entry, without a warrant, into a hotel room." 342 U.S., at 51. As may be the case here, "[I]mplied or express permission is given to such persons as maids, janitors, and repairmen" to enter rooms "in the performance of their duties." *Ibid.* But as is plainly the case here, while "exceptional circumstances" might justify entry by the police without a warrant, no such circumstances exist where there "was no question of violence, no movable vehicle was involved, nor was there an arrest or imminent destruction, removal or concealment of the property intended to be seized. In fact, the officers . . . could have easily prevented any such destruction or removal by merely guarding the door." *Id.*, at 52.[1]

In *Lustig*, the manager of a hotel allowed police to enter and search a room in the occupants' absence, again without a warrant. That search, too, was held unconstitutional. Although the decision was by a divided Court, no Justice suggested that the manager's actions somehow validated the search.

In *Chapman*, the defendants' landlord allowed police to enter and search their house in their absence without a warrant. Again this Court held the search unconstitutional. The Government argued that Georgia law gave the landlord the right to enter to view waste and to bring the officers with him for this purpose. 365 U.S., at 616. The Court—noting an absence of relevant Georgia decisions—rejected

[1] See also, *e.g.*, *People* v. *Bankhead*, 27 Ill. 2d 18, 187 N.E. 2d 705 (hotel's rights with respect to control of and access to rooms do not include authority to consent to searches without legal process and do not invest hotel with power to waive guests' constitutional rights); *State* v. *Warfield*, 184 Wis. 56, 198 N.W. 854 (1924) (roominghouse owner has no power to authorize police to search a lodger's room or to rummage through his effects).

the Government's argument as quite beside the point. Assuming that such was the law of the State, the officers' "'purpose in entering was [not to view waste but] to search. . . .'" *Ibid.* (quoting *Jones* v. *United States*, 357 U.S. 493, 500 (1958)). So also here: The officers' purpose in entering was not for those purposes for which hotel guests understand that their rooms may be entered—cleaning and service—but to search. Again, the Court in *Chapman* stated, "[T]o uphold such an entry, search and seizure 'without a warrant would reduce the [Fourth] Amendment to a nullity and leave [tenants'] homes secure only in the discretion of [landlords].'" *Id.*, at 616-617 (quoting *Johnson* v. *United States*, 333 U.S. 10, 14 (1948)). So also here: To uphold the search would leave hotel guests' privacy and possessions secure only in the discretion of clerks. And finally, the Court in *Chapman* observed, "'[I]t is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical . . . .'" *Id.*, at 617 (quoting *Jones* v. *United States*, 362 U.S. 257, 266-267 (1960)). So also here: Hotel employees' rights of entry have no more relevance to the problem at hand than the lessors' rights of entry did in *Chapman;* and the subtle distinctions between "lodgers" and "tenants" explained in cases cited by the State [2] have no more place in the law of search and seizure than the similarly subtle distinctions between "lessees," "licensees," "invitees" and "guests" to which the Court referred in the *Jones* case, 362 U.S., at 266.

---

[2] *Fox* v. *Windemere Hotel Apt. Co.*, 30 Cal. App. 162, 157 Pac. 820 (1916); *Roberts* v. *Casey*, 36 Cal. App. 2d Supp. 767, 93 P.2d 654 (1939).

Jeffers, *Lustig*, and *Chapman*, we submit, stand for the following propositions that are controlling in the case at bar: First, the Constitution protects citizens' privacy in their dwellings, whether transient or permanent. See also *e.g.*, *Johnson* v. *United States*, 333 U.S. 10 (1948) (hotel room); *McDonald* v. *United States*, 335 U.S. 451 (1948) (boarding house room); *Eng Fung Jem* v. *United States*, 281 F.2d 803, 805 (9th Cir. 1960) (hotel room).[3] Second, this protection is not to be eroded by strained applications of the "consent" doctrine. Thus, whether or not "apparent authority" may ever be a relevant circumstance in testing the constitutionality of searches and seizures, a hotel clerk has no such apparent authority with respect to hotel rooms. Nor can state property law defining the respective rights of persons having an interest in the premises in question confer upon a hotel clerk actual authority to consent to a search of a guest's room by the police. Were the law otherwise, the privacy of many citizens would no longer be secure, not because the policy of the Fourth Amendment has become less significant with the passing of time, but simply because our society has become more mobile.

Thus, respondent's argument respecting both actual and apparent authority is foreclosed by *Jeffers*, *Lustig*, and *Chapman*, whatever might be said concerning state law. Curiously enough, however, in view of respondent's argument, the fact of the matter is that in all material respects California law is entirely consistent with these decisions. That is, while in some circumstances California courts have applied an apparent authority test in search and seizure cases, at the same time it appears that in California hotel clerks do not have either actual or apparent authority to consent to searches of guests' rooms.

---

[3] For similar state court decisions, see Annot., *Transiently Occupied Room in Hotel, Motel, or Roominghouse as within Provision Forbidding Unreasonable Searches and Seizures*, 86 A.L.R. 2d 984, 987-988 (1962).

The California decision cited by the State that is clearly in point—and that may explain the lower court's refusal to accept the State's argument in the case at bar—is *People* v. *Burke*, 208 Cal. App. 2d 149, 24 Cal. Rptr. 912 (1962). In that case, police twice entered and searched a hotel room in the occupants' absence, without a warrant but with the manager's permission. The California District Court of Appeals held the entries and searches unlawful, rejecting arguments exactly like those made by the State here:

> "In the cases before us, the evidence does not establish that the [hotel] manager, Mrs. Murray, either had actual authority to consent to the entry by the police into the defendant's room, or that she believed she had such authority, or that the officers reasonably and in good faith believed she had such authority. The record is entirely silent on these questions. Mrs. Murray did not testify at the trial. *The mere fact that a person is a hotel manager does not import an authority to permit the police to enter and search the rooms of her guests.*" 24 Cal. Rptr. at 919. (Emphasis supplied.) [4]

The other cases cited by the State are either irrelevant or tend to sustain petitioner's argument. Obviously, cases in which the defendant himself consented to a search or in which the defendant no longer had any interest in the premises searched are beside the point.[5] Moreover, neither

---

[4] In holding the searches unlawful, the court in *Burke* relied on the California Supreme Court's similar decision in *People* v. *Roberts*, 47 Cal. 2d 374, 303 P.2d 721 (1956), that apartment house managers have no apparent authority to consent to searches of tenants' apartments. In *Burke*, the court went on to affirm the appellant's conviction because no property seized during the illegal searches had been introduced at the trial and no evidence introduced at the trial had been "fruit of the poison tree."

[5] Cases cited by the State (Br. pp. 9-10) in which the defendant himself consented include *Davis* v. *United States*, 328 U.S. 582 (1946); *Zap* v. *United States*, 328 U.S. 624 (1946); and *People* v. *Michael*, 45 Cal. 2d

the California decisions grounded upon actual authority nor those grounded upon apparent authority impair the validity of *Burke*.[6] Finally, the actual authority decisions —none of which involved searches and seizures—establish simply that the rights of hotel management *vis-a-vis* guests are such as are agreed upon by the parties, *i.e.*, that "the relation established" between a hotel and its guests "depends upon the contract." *Roberts* v. *Casey*, 36 Cal. App. 2d Supp. 767, 93 P.2d 654, 657 (1939); following *Fox* v. *Windemere Hotel Apt. Co.*, 30 Cal. App. 162, 137 Pac. 820

751, 290 P.2d 852 (1955) (consent by defendant and by her mother, a joint occupant of the premises). Cases cited (Br. pp. 9-10) in which hotel rooms were searched with consent of the management after the defendant had surrendered his room and abandoned property found therein include *Abel* v. *United States*, 362 U.S. 217, 241 (1960), and *Feguer* v. *United States*, 302 F.2d 214, 249 (8th Cir. 1962).

[6] The discussion of the apparent authority of a hotel clerk in *People* v. *Ambrose*, 155 Cal. App. 2d 513, 318 P.2d 181, 188 (1957) seems inconsistent with the decision in *Burke*. However, *Burke* is a later decision and rests upon the California Supreme Court decision in *People* v. *Roberts*. See note 3, *supra*. Moreover, the discussion in *Ambrose* is at best an alternative holding. Finally, on the facts it appears that, whether or not the search in *Ambrose* was legal, the defendant in effect had consented to the seizure. The police entered his hotel room in his absence with the consent of the management, but then left and returned with the defendant himself who assisted the officers by sorting property in the room into that which he had stolen and that which he had not.

In addition to *Burke* and *Ambrose*, the apparent authority cases cited by the State (Br. pp. 11-12) include two in which consent was given by persons who lived in and owned the homes that were searched and who, therefore, unlike a hotel clerk, appeared to be people protected by, and in a position to waive, the constitutional safeguards (*People* v. *Gorg*, 45 Cal. 2d 778, 291 P.2d 469 (1955); *People* v. *Caritativo*, 46 Cal. 2d 68, 292 P.2d 513 (1955)); one case in which the defendant himself waived the immunity by taking a dormitory room subject to school rules providing for inspection (*People* v. *Kelly*, 195 Cal. App. 2d 699, 16 Cal. Rptr. 177 (1961) (consent by master of dormitory)); an additional case, like *Abel*, in which the defendant's right of occupancy had apparently ended (*People* v. *Crayton*, 174 Cal. App. 2d 267, 344 P.2d 627 (1959)); and a case in which the search was conducted pursuant to applicable military regulations (*People* v. *Shepard*, 213 Cal. App. 2d 697, 28 Cal. Rptr. 297 (1963)).

(1916).[7] In other words, if these decisions demonstrate anything relevant, it is that a hotel's "actual authority" to consent to searches of guests' rooms is exactly the same under California law as we say it is under the Constitution —hotels have such authority only if their guests plainly have agreed that they shall.

Thus it is unnecessary for the Court in this case to consider whether consent by a person having only apparent authority may ever validate a search. However, as the State devotes some time to the problem, we feel obliged to respond briefly.

First, we note that the failure of the Court in *Jeffers*, *Lustig*, and *Chapman* even to consider the possible applicability of an apparent authority doctrine strongly suggests that it is alien to Fourth Amendment law. It is true that California decisions are to the contrary; but, so far as we have been able to discover, the California approach does not represent the prevailing view.[8]

---

[7] In both *Roberts* and *Fox* the court determined that certain premises were lodging houses rather than apartments. In consequence, in *Roberts* the court held that the owner of such premises could commence unlawful detainer proceedings without first giving notice. And in *Fox* the court held that the owner acquired a lodging house owner's lien on an occupant's luggage when the occupant failed to pay for his room.

In addition to *Roberts* and *Fox*, the State cites *People* v. *Vaughn*, 65 Cal. App. 2d Supp. 844, 150 P.2d 964 (1944), to support its actual authority argument (Br. p. 10). However, the *Vaughn* case held only (1) that a hotel may prohibit strangers from disturbing guests in the course of distributing religious tracts, and (2) that persons who engage in that activity after being requested to leave may be convicted of disturbing the peace.

[8] California decisions appear to be the only "apparent authority" decisions among the numerous cases cited and discussed in Annot., *Authority to Consent for Another to Search or Seizure*, 31 A.L.R. 2d 1079 (1953). For cases in which searches and seizures were held illegal in circumstances where California's "apparent authority" doctrine probably would have required a contrary result, see, *e.g.*, *Holzhey* v. *United States*, 223 F.2d 823 (5th Cir. 1955) (consent by daughter and son-in-law to search of their residence held not to authorize search of mother's locked personal effects found

Nor does the California rule conform with the policy of the Fourth Amendment. We submit that it is not appropriate to tailor that Amendment according to what appears "reasonable" from the perspective of the officer. Rather, the apparent authority doctrine should be viewed from the perspective of the citizen, who is, after all, the beneficiary of the Fourth Amendment. As we read this Court's decisions, the citizen's constitutional right consists of freedom from searches and seizures without a warrant except in circumstances where, for some compelling reason, it would be unreasonable to require a warrant. The apparent authority doctrine, however, would establish an exception to the warrant requirement that would have no justification whatever in terms of necessity. Moreover, we suggest that adoption of such an exception would encourage general searches. If the person from whom consent is sought has no personal stake in the matter, he is not likely to put the police to the test of the warrant procedure by resisting their request. In consequence, in many cases there would be little inducement for the police to submit to the supervision of a magistrate and to the limitations of a warrant when an exploratory search could be so easily made.

The choice comes to this: Whether the citizen should be exposed to the risk of a search being validated because of the "consent" of a third person who is actually without authority, or whether the police should bear the risk of in-

---

therein); *United States* v. *Blok*, 188 F.2d 1019 (D.C. Cir. 1951) (consent by defendant's superior in Government agency held not to authorize search of defendant's desk and personal effects found therein); *United States* v. *Rubner*, 51 F.2d 579 (D. Md. 1931) (search of defendant's gristmill in defendant's absence held unlawful notwithstanding consent by defendant's brother-in-law to whom defendant's wife referred the officers as being in charge of the mill); *United States* v. *Sully*, 56 F. Supp. 942 (S.D.N.Y. 1944) (consent to officers' entry by defendant's mother-in-law held not to authorize search).

validation of the search because of such lack of actual authority when they choose to proceed without a warrant. We urge that the policy of the Fourth Amendment requires, as the decisions of this Court in *Jeffers*, *Lustig*, and *Chapman* suggest, that the risk be placed upon the police. "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege," and " 'courts indulge every reasonable presumption against [such] waiver. . . .' " *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). These salutory principles should not be displaced in Fourth Amendment law by doctrines rooted in the law of agency.

II. The Seizure Was Unconstitutional

If the search was unlawful the seizure was also and need not be considered further. But even if the search had been proper, the seizure could not be defended.

The State concedes that the clerk had no authority to consent to the seizure of petitioner's property; but the State contends that, since the clerk did have authority to consent to the search, the officers had authority independent of that consent to seize whatever objects they discovered that were appropriate subjects of seizure (Br. p. 19).[9] The difficulty with this argument is that, as we pointed out in our opening brief, the property seized, except for the gun, was not contraband or the "fruits or instrumentalities" of crime—articles which historically were subject to seizure because their possessor had no right to possession or had forfeited it by using the goods for criminal purposes.

---

[9] We note that, in the framework of the State's argument, the "concession" as to the lack of authority by the clerk "to consent to seizure of personal property belonging to another" (Br. p. 19) has no practical importance, since, according to the State, the clerk's authority to consent to the search in conjunction with the officers' authority to seize validated both the search and the seizure.

Rather, petitioner's glasses and clothing, though lawfully his, were seized simply because the police thought they might be useful as evidence. Yet under this Court's decisions seizures of such property, whether or not it is evidence, are not permitted with or without a warrant. "In the one case, the government is entitled to the possession of the property; in the other it is not." *Boyd* v. *United States*, 116 U.S. 616, 623 (1886).

The State replies to the contrary that the glasses and clothing *were* "instrumentalities" (Br. pp. 19-21); and that in any event the "mere evidence" rule should not apply to the States (Br. pp. 15-19).

The first of those contentions was answered in our opening brief. The State's argument that the glasses and clothing were "instrumentalities" rests on nothing more than the fact that the gunman wore clothes—as does everyone—and wore a hat "with the brim turned down" (Br. p. 21)—as does everyone who wears a hat. But the glasses and clothing can hardly be said to be the "means" by which the crime was committed. That is why it is held that ordinary clothes are not "instrumentalities" even when they may have been worn by someone suspected of crime. See *Williams* v. *United States*, 263 F.2d 487 (D.C. Cir. 1959) (coat); *United States* v. *Richmond*, 57 F.Supp. 903 (S.D. W.Va. 1944) (clothing); cf. *Morrison* v. *United States*, 262 F.2d 449 (D.C. Cir. 1958) (handkerchief).

The State's other contention—that the "mere evidence" rule should not apply to the States—is based on the claim that the rule "is without a substantial policy basis" (Br. p. 17). But that is not so, as is demonstrated by this Court's decisions cited in our opening brief (Br. pp. 27-28). The basis for the rule is the policy of the Fifth Amendment as it influences what is deemed "reasonable" for purposes of the relevant Fourth and Fourteenth Amendment

protections. That is, the seizure of a person's property for use against him in a criminal trial is "tantamount to coerced testimony . . .," *Mapp* v. *Ohio*, 367 U.S. 643, 656 (1961), and hence in normal circumstances is an unreasonable seizure. This consideration is not controlling only where it may be said that the property is not really the defendant's, as where it is stolen, or at any rate that the government has a right to seize it independent of its usefulness in prosecuting the possessor, as in the case of property concealed in order to avoid payment of duties. See the extensive discussion in *Boyd*. And while it may be that the ancient laws respecting forfeiture of instruments of crime, such as the law of deodand, have little force today, the consequence of a strict adherence to the policy considerations upon which *Boyd* was grounded would require a narrowing of the right of the State to seize, not a broadening.

There is one further consideration supporting the *Boyd* rule that may be worth noting. The State is contending here for the right to seize, not simply clothing and glasses, but anything that might constitute evidence. In an appropriate case, this would include, for example, the entire books and records of a businessman. This type of seizure of property admittedly owned by another person after only the sort of *ex parte* hearings employed in the search warrant procedure amounts to the taking of property with less than is normally deemed due process. But more, in this case the State contends for the right of the police to seize without any hearing at all. The danger of empowering the police to seize whatever property strikes them as "evidence" is perfectly illustrated in this case; the police carried away not only the gun, glasses and clothing used at the trial, but also address books and "other miscellaneous evidence" (R. 73) which evidently turned out not to be useful. As the State takes pains to point out, the police are

not lawyers (Br. p. 13). Much less should the law treat them as though they were judges.[10]

Finally, assuming *arguendo* that the State is correct in asserting that on the whole society would be better served if the *Boyd* restriction were not applied to the States, it remains true that this restriction is an important ingredient of Fourth Amendment law which has been followed in a host of decisions of this Court and the lower federal courts. (See cases cited on pp. 27-28 of our opening brief.) In consequence, this rule is a part of the "standard of reasonableness [that] is the same under the Fourth and Fourteenth Amendments," rather than a technical limitation that the states may ignore in "developing workable rules governing arrests, searches and seizures . . . ." *Ker* v. *California*, 374 U.S. 23, 33, 34 (1963).[11]

---

[10] In connection with this due process consideration, it is instructive to consider California law. As we noted in our opening brief (Br. p. 29 n. 12), a California statute purports to authorize warrants for the seizure of property merely as evidence (Cal. Pen. Code § 1524; Cal. Stats. 1957, c. 1884, p. 3289, § 1). However, it does not necessarily follow, as the State seems to think, that California law purports to authorize such seizures without a warrant whenever the police discover the evidence lawfully. On the contrary, such seizures without a warrant, may be "unreasonable" under California law because of the absence of procedural safeguards such as those provided by the search warrant procedure or by the civil discovery motion for production and inspection. See *Greyhound Corp.* v. *Superior Court*, 56 Cal. 2d 355, 394-395, 364 P.2d 266, 286-287 (1961).

[11] Apart from the character of items seized, there is a further difficulty respecting the validity of the seizure. If the clerk had no right to consent to the seizure, as the state concedes, it appears that the officers could do no more than search without securing a warrant. The State argues that the purpose of the search was to look only for the gun, that the clerk consented to the search for the gun because he was fearful for the safety of the residents of the hotel, and that when the officers came across the other items here in question they had authority to seize them without a warrant (Br. pp. 11, 20-21). It is true that, in the case of a search incident to an arrest, the arresting officers may seize property properly subject to seizure if they discover it in the course of a search aimed at other types of property. *Harris* v. *United States*, 331 U.S. 145, 155 (1946). In the case at bar, however, the State concedes that a search incident to arrest is not involved. Rather, assuming the validity of the State's "consent" argu-

III. Use of the Unconstitutional Evidence at Petitioner's Trial was Not Harmless Error

The use of the unconstitutionally obtained evidence—the gun, glasses and clothing—at petitioner's trial was not mere "harmless error." The State contends that "the prosecution's case was complete without" those items of evidence (Br. p. 27). But, contrary to what the State appears to think, the Court is "not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Fahy* v. *Connecticut*, 375 U.S. 85, 86-87 (1963). Under that test—indeed under any test—the use of the items in question as evidence was far more clearly prejudicial than the use of the paint can and brush with which the Court was concerned in *Fahy*.

The evidence for and against petitioner is summarized in our opening brief (pp. 3-6). The prosecution's case rested on (1) testimony of eyewitnesses to the robbery identifying petitioner, (2) testimony of an alleged accomplice implicating petitioner, (3) testimony of those witnesses that the gun, glasses and clothing looked like the

---

ment, it would appear that the appropriate standard would be that which applies to searches pursuant to a search warrant. That is, since the purpose of the officers was only to search, the authority of the officers to seize should be no broader than the terms of the consent, which in this sense is analogous to a warrant. But if the police had secured a warrant for the search for the gun, they could not have seized anything else without a further warrant. "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron* v. *United States*, 275 U.S. 192, 196 (1927). No reason appears why, if the consent was in terms of a search for the gun as the State says, the authority of the police to seize should be broader than if they had secured a warrant in like terms.

gun used and the glasses and clothing worn by the gunman, (4) testimony of police officers that the physical evidence had been seized from petitioner's room, and (5) testimony of one police officer that petitioner had orally confessed to the crime. Petitioner's defense, on the other hand, consisted principally of testimony by two witnesses that he had been with them at the time of the crime. He tried to show by cross-examination of the State's witnesses that the eye-witnesses' identifications and the testimony of the alleged accomplice were unreliable, the latter because given in exchange for a light sentence. And he attacked the confession as involuntary on the ground that it had been obtained two days after his arrest but before arraignment under coercive circumstances—which included confrontation with the physical evidence illegally seized from his room (R. 93, 94, 127.)

Thus, it is apparent (1) that the conviction rested upon the jury's resolution of the issue of credibility against petitioner's witnesses and in favor of the State's; and (2) that the jury's resolution of that issue must almost certainly have been influenced by the illegal evidence—the physical evidence seized from petitioner's room and the testimony relating to it—and the confession to which the evidence, at least in part, may well have led.

The State tries to dismiss the illegal evidence as unimportant, although it deemed it sufficiently probative at the time to introduce it over petitioner's objections. The State's theory, now, is that the evidence established only what "similar" objects involved in the robbery looked like. It claims that it could have introduced a similar gun not owned by petitioner "for demonstration purposes" and says that the same is true of the glasses and clothing (Br. pp. 26-27). But that is beside the point. The impact of the evidence lay in the fact that the gun, the glasses, and the clothing were *petitioner's*.

As was said in *Bram* v. *United States*, 168 U.S. 532, 541 (1897):

> "[T]he prosecution cannot on the one hand offer evidence to prove guilt, and which by the very offer is vouched for as tending to that end, and on the other hand for the purpose of avoiding the consequences of the error, caused by its wrongful admission, be heard to assert that the matter offered . . . was not prejudicial because it did not tend to prove guilt."

In short, it is apparent that "there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Fahy* v. *Connecticut*, 375 U.S. at 86-87. Indeed, in this case it is almost a certainty. Accordingly, the conviction should be reversed without reaching the further question whether use of unconstitutional evidence at a trial can ever be "harmless" error—the question not decided in *Fahy*. However, since the State discusses this question we think it necessary to set forth our views briefly.

The Courts of Appeals for the District of Columbia and the Eighth Circuit have held that the admission of evidence seized in violation of the defendant's constitutional rights cannot be harmless error. *Williams* v. *United States*, 263 F.2d 487, 490 (D.C. Cir. 1959); *Honig* v. *United States*, 208 F.2d 916, 921 (8th Cir. 1953). The Court of Appeals for the Second Circuit has held to the contrary. *United States* v. *McCall*, 291 F.2d 859, 860 (1961). We submit that the former view is correct.

The argument that the use of unconstitutionally obtained evidence may be dismissed as mere "harmless error" assumes that the only relevant "prejudice" lies in the impact of the evidence on the jury. It ignores the important "prejudice" inherent in any violation of a constitutional

right. That is, we read *Mapp* v. *Ohio*, 367 U.S. 643 (1961), to mean that the *use* at trial of unconstitutionally obtained evidence is itself a violation of the constitution. If so, the Court should not stop to speculate whether the defendant has been "prejudiced" in any fashion other than being deprived of that to which the Constitution entitled him—a trial at which such evidence is not used.

Our argument finds support in the manner in which the Court deals with other constitutional violations. Thus, if an involuntary confession is used at a trial, the admission of the confession in evidence denies the defendant "a constitutional right" and "requires reversal" without speculation as to its impact on the jury. *Lyons* v. *Oklahoma*, 322 U.S. 596, 597 (1944); *Malinski* v. *New York*, 324 U.S. 401, 404 (1945); *Rogers* v. *Richmond*, 365 U.S. 534, 545 (1960). Or if the accused is deprived of his right to counsel, the Court does "not stop to determine whether prejudice resulted." *Hamilton* v. *Alabama*, 368 U.S. 52, 55 (1961).[12] And if the accused is given a trial by an eleven man jury when the Constitution requires twelve jurors, his conviction must be reversed even though the Court may believe that the "infraction of the Constitution is slight . . . . It is not [the Court's] province to measure the extent to which the Constitution has been contravened . . . ." *Patton* v. *United States*, 281 U.S. 276, 292 (1930).

Moreover, it is difficult to reconcile the harmless error argument with the policies supporting the exclusionary rule. One principal purpose of that rule is to destroy the incentive for constitutional violations. But that incentive will not be destroyed as long as the hope is nurtured that such evidence can be used and then dismissed as harmless.

---

[12] If the law were otherwise, *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) did nothing at all to the rule of *Betts* v. *Brady*, 316 U.S. 455 (1942).

A second principal purpose for the rule is to maintain the integrity of the courts. As the Court observed in *Elkins* v. *United States*, 364 U.S. 206, 222-223 (1960):

> "'For those who agree with me,' said Mr. Justice Holmes, 'no distinction can be taken between the Government as prosecutor and the Government as judge.' 277 U.S., at 470. (Dissenting opinion.) 'In a government of laws,' said Mr. Justice Brandeis, 'existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy . . . .' 277 U.S., at 485 (Dissenting opinion.)"

The petitioner in *Fahy* made the relevant point in compelling terms (Br. p. 13):

> "*Mapp* v. *Ohio* teaches that the admission of illegally seized evidence at the trial is a violation by the trial court itself of the constitutional rights of an accused. The problem is now one of direct judicial disobedience to the Constitution, and not merely an indirect judicial approbation of a violation of the constitutional right of privacy by ill trained or lawless police officials. If our trial courts are adjured not to place the stamp of judicial approval upon the illegal acts of law enforcement agencies, still less should our appellate courts gloss over a disregard of constitutional rights by the trial court itself. What lesson will our courts teach if they can dismiss their own disregard of constitutional rights as harmless? The harm done to the accused may

indeed be slight, but the harm done to the reputation of our courts as guardians of our constitutional rights is irreparable."

In short, the use of the illegally seized evidence at petitioner's trial was plainly prejudicial in that it almost certainly contributed to his conviction. But whether it did or not, we think that no special showing of prejudice should be required where a trial is so conducted as to violate the defendant's constitutional rights.

Conclusion

For the foregoing reasons the judgment of the California District Court of Appeal should be reversed.

Respectfully submitted,

William H. Dempsey, Jr.
734 Fifteenth Street, N.W.
Washington, D. C.
Attorney for Petitioner
(Appointed by this Court)

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1963

No. 209

JOSEPH LYLE STONER, *Petitioner,*

vs.

CALIFORNIA, *Respondent.*

On Writ of Certiorari to the District Court of Appeal of California, Second Appellate District

PETITION FOR REHEARING

STANLEY MOSK,
Attorney General of the State of California,
ARLO E. SMITH,
Chief Assistant Attorney General,
6000 State Building,
San Francisco 2, California,
Attorneys for Respondent.

ALBERT W. HARRIS, JR.,
Deputy Attorney General,
MICHAEL J. PHELAN,
Deputy Attorney General,
Of Counsel.

Subject Index

Table of Authorities Cited

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1963

No. 209

JOSEPH LYLE STONER, *Petitioner,*

vs.

CALIFORNIA, *Respondent.*

On Writ of Certiorari to the District Court of Appeal of California, Second Appellate District

PETITION FOR REHEARING

To the Honorable Earl Warren, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

The respondent, the People of the State of California, respectfully petitions under Rule 58 for a rehearing by this Honorable Court of the above-entitled cause.

PRELIMINARY STATEMENT

Respondent respectfully urges this Court in considering this Petition for Rehearing to consider the fact that this case was placed on the summary calendar for oral argument. There is no doubt that this course was indicated by the opinion of the District Court of Appeal and the attack upon that opinion in the opening brief of petitioner. But the issues decided by this Court were not framed until the filing of respondent's brief and petitioner's reply brief. At this point we respectfully submit that the issues framed required more than 30 minutes for treatment at oral argument. Noteworthy is the fact that respondent was unable, because of the time limitations, to make more than a cursory reference to the question of prejudicial error at the oral argument.

I

THE OPINION OF THE COURT CREATES CONFUSION IN THE LAW OF SEARCH AND SEIZURE APPLICABLE TO THE STATES BECAUSE IT APPEARS TO FASTEN THE "MERE EVIDENCE" RULE UPON THE STATES

Even though the point was plainly in issue and fully briefed by both sides, the question of whether the "mere evidence" rule is to be applied to the states was not clearly decided by the opinion in this case. Footnote 4 seemingly fastens this doctrine to the states, but does so without discussion of the relevant historical and policy considerations, and without distinguishing between this Court's supervisory powers over federal courts and constitutional principle binding on the states.

Furthermore, without discussion or consideration of the possible impact, the language of the footnote casts doubt on the California statute which permits a search warrant to issue for the seizure of ". . . any evidence which tends to show a felony has been committed or tends to show that a particular person has committed a felony." Cal. Pen. Code § 1524, subdiv. 4. This section was based upon Chapter 263.02 of the Wisconsin Statutes and is in accordance with the Uniform Law of Arrest. We submit that to allay confusion on this point an unequivocal decision is required.

II

IN ITS TREATMENT OF THE ISSUE OF ACTUAL AUTHORITY TO CONSENT TO A SEARCH, THE OPINION PURPORTS TO DECIDE A QUESTION OF CALIFORNIA LAW WHICH IS UNSETTLED AND RELIES UPON LANGUAGE FROM A CASE WHICH IS DICTUM AND OUT OF CONTEXT

In the opinion, the statement is made that ". . . there is no intimation in the California cases cited by the respondent that California has [a law giving a hotel proprietor blanket authority to authorize the police to search rooms of the hotel's guests]." *Stoner v. California,* ___ U. S. ___ (1964). It is plain that this question was not settled, but nevertheless the Court's opinion purports to interpret California cases and decide a question which is essentially one requiring interpretation of California law. We suggest that the better and proper course would have been to remand the case to the California courts to allow them to decide this issue. This question has never been treated by the District Court of Appeal below.

Moreover, the language of the *Burke* case cited in Footnote 7 is mere dictum and has been excerpted out of context. That language was unnecessary to the decision reached in that case. The sentence following the one quoted plainly shows the context of the language used. That sentence states:

> "Therefore, proof that the police were let in by the manager, *without more*, cannot satisfy the burden upon the prosecution to show that the officers reasonably believed in good faith that they had the consent of an authorized person. (*People v. Roberts, supra,* 47 Cal.2d 374, 377.) There is *no other evidence* in the record tending to show such belief on the part of the officers." (Emphasis added.) *People v. Burke,* 208 Cal. App.2d 149, 160, 24 Cal.Rptr. 912 (1962).

When viewed in its entirety, we submit the language quoted is inapposite to this issue.

III

IN REJECTING THE CALIFORNIA DOCTRINE OF APPARENT AUTHORITY TO CONSENT TO A SEARCH, THE OPINION OF THIS COURT IGNORES THE PRINCIPLES OF FEDERAL-STATE RELATIONSHIPS ANNOUNCED IN KER v. CALIFORNIA; DOES NOT CONSIDER THE RELEVANT POLICY BASIS FOR THIS RULE; AND ANNOUNCES A RATIONALE IN REJECTING THIS RULE WHICH CASTS DOUBT ON OTHER ESTABLISHED RULES OF SEARCH AND SEIZURE IN JOINT OCCUPANCY CASES

In reliance upon this Court's statement in *Ker v. California,* 374 U.S. 23 (1963), that the states were free to develop "workable rules" of search and seiz-

ure so long as they were not in conflict with the Fourteenth Amendment's proscription of unreasonable searches and seizures, respondent urged this Court to consider the California apparent authority rule as a justification for a search and seizure in this case. Without considering the case in the context of the concepts of federalism announced in *Ker v. California, supra*, the opinion of the Court not only rejects the application of the doctrine to this case, but rejects the doctrine altogether as "unrealistic" on the theory that technicalities of the law of agency have no place in a law of search and seizure. Additionally, it is said only a person whose right is at stake can waive the right.

We note that no consideration is given to the basis for this California rule. The rationale of the rule was stated by Mr. Justice Traynor in the case of first impression on this point in California. In *People v. Gorg*, 45 Cal.2d 776, 783, 291 P.2d 469 (1955), Justice Traynor wrote:

> "In this proceeding we are not concerned with enforcing defendant's rights under the law of trespass and landlord and tenant, but with discouraging unreasonable activity on the part of law enforcement officers. 'A criminal prosecution is more than a game in which the Government may be checkmated and the game lost merely because its officers have not played according to rule.' (Mr. Justice Stone in *McGuire v. United States*, 273 U.S. 95, 99 [47 S.Ct. 259, 71 L.Ed. 556]), and when as in this case the officers have acted in good faith with the consent and at the request of a home owner in conducting a search, evidence

so obtained cannot be excluded merely because the officers may have made a reasonable mistake as to the extent of the owner's authority."

Furthermore, the opinion of the Court demonstrates a misunderstanding of the California rule. The rule does not require that police officers have a basis to believe that a night clerk or other employee of a hotel has been given authority to permit the police to search. Rather, the rule requires only that the total circumstances known to the officer be such that he reasonably believe the person authorizing the search has the authority to do so. Thus, whether the hotel clerk had been authorized by petitioner to permit a search, while plainly to be considered as a factor in assessing the officers' reasonable belief, should not be the dispositive factor.

Additionally, the waiver argument advanced in striking down the "apparent authority" rule casts grave doubt upon other settled rules of search and seizure involving consent by a joint occupant. Thus, if a person must "waive by word or deed, either directly or through an agent," his right to be free from an unreasonable search and seizure, then the well settled line of cases in which a husband or wife, a joint tenant, a relative, or other person jointly occupying premises has been allowed effectively to consent to a search and seizure must be considered to have been overruled by this opinion. See generally Anno., 31 A.L.R.2d 1078 (1953).

IV

THE COURT'S OPINION APPEARS TO ANNOUNCE A RULE REQUIRING AUTOMATIC REVERSAL OF CASES WHERE ILLEGALLY OBTAINED EVIDENCE IS RECEIVED IN A CRIMINAL PROSECUTION; THIS IS A STRICTER RULE THAN THAT WHICH HAS BEEN APPLIED IN FEDERAL CASES

After concluding that the search in this case was unlawful, the Court's opinion cryptically states, "[s]ince evidence obtained through the search was *admitted* at the trial, the judgment must be reversed. *Mapp v. Ohio,* 367 U.S. 643.'" (Emphasis added.) *Stoner v. California,* ..... U.S. ..... (1964). As thus stated, the opinion appears to announce that in every case where illegally obtained evidence is received, the fact of "admission" compels reversal of the judgment.

The footnote reference which follows this statement does nothing to dispel this inference. In the footnote the "contributed to the conviction" test of *Fahy v. Connecticut,* 375 U.S. 85, 86 (1963) is cited, and it is stated that the evidence must have "contributed" because it undoubtedly influenced the jury's determination of the credibility of the witnesses. The "contributed to the conviction" test appears to announce no more or less than that if the illegally obtained evidence was relevant and material, *i.e.,* the criteria of admissibility, then a reversal of the judgment must follow. If this is to be the rule, then we ask that the Court unmistakably announce it as such.

For the appellate courts of this State are commanded by the California constitution not to reverse

a judgment except where a "miscarriage of justice" has occurred. Cal. Const., Art. VI, § 4½. This State constitutional command has been applied by the California Supreme Court to a case where illegally obtained evidence was received. *People v. Parham*, 60 A.C. 333, 33 Cal.Rptr. 497 (1963). Thus, the appellate courts of this State must apply a rule of prejudicial error in cases of illegally obtained evidence.

In the event the opinion in this case is intended to strike down these principles of prejudicial error as repugnant to the Fourteenth Amendment, then we request that this Court do so expressly and allay the confusion which will surely follow in the wake of this decision and *Fahy v. Connecticut, supra.*

That confusion has previously existed is apparent from the conflict in the decisions of the lower federal courts. The following cases have applied the prejudicial error rule: *United States v. McCall*, 291 F.2d 859, 860 (2d Cir. 1961); *Woods v. United States*, 240 F.2d 37, 40 (D.C. Cir. 1956), cert. denied, 353 U.S. 941 (1957); *Bilodeau v. United States*, 14 F.2d 582, 585 (9th Cir. 1926), cert. denied, 273 U.S. 737 (1926) (alternative holding); cf. *Fitter v. United States*, 258 Fed. 567, 573-75 (2d Cir. 1919). In these cases the prejudicial error rule was held inapplicable: *Williams v. United States*, 263 F.2d 487, 490, 491 (D.C. Cir. 1959); *Bynum v. United States*, 262 F.2d 465, 468-69 (D.C. Cir. 1958); *Honig v. United States*, 208 F.2d 916, 921 (8th Cir. 1953); cf. *Billeci v. United States*, 290 F.2d 628 (9th Cir. 1961).

CONCLUSION

For the foregoing reasons, respondent respectfully requests that a rehearing be granted in this case to clear up confusion engendered by the opinion heretofore issued, and to allow for a more thorough consideration of the issues ultimately framed in this case.

Dated, San Francisco, California,
April 23, 1964.

STANLEY MOSK,
Attorney General of the State of California,
ARLO E. SMITH,
Chief Assistant Attorney General,
Attorneys for Respondent.

ALBERT W. HARRIS, JR.,
Deputy Attorney General,
MICHAEL J. PHELAN,
Deputy Attorney General,
Of Counsel.